THE PARSONS LAVV.

Collected
Out of the whole body
of the Common LAVV,
and ſome late
Reports.

By W. HUGHES of Grayes
Inne, *Eſquire.*

HOR.
Si quid noviſti rectius iſtis
Candidus imperti: ſi non, his utere
mecum.

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CHAP.

FINIS.

The PARSONS Law.

CHAP. I.

Of Archbiſhops and Biſhops. and of their Election, confirmation, conſecration, and inveſture. And when the Temporalties ſhall be delivered unto them.

AN Archbiſhop is a ſecular perſon ſpiritual, who hath juriſdiction in all cauſes and things Eccleſiaſticall, in a Province, within the Realm whereof he is the Archbiſhop.

In the Realme of England there are

C.Litt.94.a. De Math. Parker Antiquitt. Britt. 111. Ranilp. de Cheſter.li.2.c.7.57. 16.Ely.Dyer. 327.

but two Provinces, *viz.* Canterbury and Yorke. The Archbiſhop of Canterbury is at this day ſtiled *Primas & Metropolitanus totius Anglia.* The Archbiſhop of Yorke *Primas & Metropolitanus Anglia.*

Each of theſe Archbiſhops hath within his Province Suffragan Biſhops of ſeverall Dioceſſe. The Archbiſhop of Canterbury hath under him within his Province, Rocheſter his principall Chaplin, London his Deane, Wincheſter his Chancellour, Norwich, Lincoln, Ely, Chicheſter, Salisbury, Exeter, Bath and Wels, Worceſter, Coventry & Lichfeild, Hereford, Landaffe, Saint Davids, Bangor, and Saint Aſaph, Glouceſter, Briſtowe, Peterborowe, and Oxford.

The Archbiſhop of Yorke hath under him within his Province, The Biſhop of the County Palatine of Cheſter, erected and annexed by King *Henry* the eight to his Archbiſhopricke; the Biſhop of the Countie Palatine of Durham; the Biſhop of Carlile, and the Iſle of Man annexed alſo to his Province by King *Henry* the eight.

The Archbiſhop of Canterbury hath the precedence of all the Clergie within

in the Realme of England, and is ranked before all the Nobility of England, next and immediately after the Kings children, as appeareth by the Statute of 31. H. 8. cap. 10. and in all ancient charters, statutes and acts of Parliament. The Bishops were ever named before the temporall Lords, as appeareth by the Statutes of *Magna Charta*, *Charta de Foresta*, *&c. Hen. Dei gr. &c. Archiepiscopis Episcopis Comitibus Baronibus, &c.*

All the Archbishopricks and Bishopricks within the Realme of England were of Kings Foundations. And the Kings of England were Founders of them all. At the first they were *Donativa ari per traditionem anali & pastoralis Baculi*. But King *John* by his Charter 15. *Ianuarij Anno Regni sui* 17. *De communi consensu Baronum*, granted that they should be Elegible. And after that came in the *Conge de eslier*.

C. 5. ul. 14. in Condries case de Stat. 1. Iac. cap. 3.

17. E. 3. 40.

They hold the possessions of their Bishopricks *per Baroniam*, as appeareth *ex Rott. Patent de Ann.* 18. *Hen.* 3. *Membr.* 17. *Mandatum est omnibus Episcopis qui conventuri sunt apud Glouc. estriam die Sabath. in Crastin. Sanctæ Katherinæ firmiter inhibendo Picool sicut Baroniis suas*

Rott. Patt. 18 He. 3. m. 17.

quas de Rege tenent diligant nullo modo præſumant Conſilium tenere de aliquibus quæ ad Coronam Regis pertinent, vel quæ perſonam Regis, vel ſtatum ſuum, vel ſtatum Concilii ſui contingunt; ſcitari pro certo, quod ſi fecerint, Rex inde ſe capiat ad Baronias ſuas. And they ſit in Parliaments in reſpect of their Temporal poſſeſſions and Baronyes.

7. H. 8. Kellaway. 184. D. Standiſh caſe.

The Dioceſſe of every Archbiſhop and Biſhop is divided into Archdeaconries, according unto the extent of the Biſhopricke. Whereof ſome are by Preſcription, as in the Archdeaconry of Richmond; ſome are *de jure*, by the Law; and ſome are by Covenant or contract made betweene the Biſhop and the Archdeacon. When the Archdeacon hath his juriſdiction by Covenant or contract, the ſame doth not take away the juriſdiction of the Biſhop, as the ſame doth where the Archdeaconry is by preſcription, or *de jure*: but if the Biſhop doth hold plea, or intermeddle with any thing within the Archdeaconry by covenant or contract, the Archdeacon may have an action of covenant againſt the Biſhop. But if the Biſhoppe doth intermeddle within

17. E. 3. 21. C. 5. par. in Cauſries caſe.

8. h. 6. 3. per Chauntrell.

within the Archdeaconry, where the Archdeaconry is by preſcription, or *de jure*, in ſuch caſe the Archdeacon may have a *Prohibition* againſt the Biſhop. All which was lately reſolved in the Court of Kings Bench, *Trinit.* 21. *Iacobi* in *Caſtrell* and *Iones* caſe.

The Archdeacon is *oculus Epiſcopi*, And there are ſixty dignities of Archdeaconries within the Realme of England; and thoſe are divided into Deanries, and Deaneries into Pariſhes, Townes and Hamlets. C. Litt. 94. a.

To the Creation of every Archbiſhop or Biſhop, there is neceſſarily required two things; firſt, Election; ſecondly, Confirmation, Conſecration and Inveſture. Election is made after this manner; A Licence under the great Seale of England is granted unto the Deane and Chapter of the Cathedrall Church, where the Sea of ſuch Archbiſhop or Biſhop is void, to proceede to the Election of a new Archbiſhop or Biſhop, with a letter Miſſive containing the perſon whom they ſhall elect or chooſe to the ſaid Archbiſhopricke or Biſhopricke, being void. This Election muſt be made within twelve

dayes after that the Licence and Letters Miſſive are to them delivered. For if the Deane and Chapter ſhall deferre their election above twelve dayes after they have received the Licence and the Letters Miſſive, the King doth uſually by his Letters Patents under the great Seal of England, nominate or preſent the perſon to the Office and Dignity of the Biſhopricke being void. And ſuch nomination or preſentment, if it be to the Office and dignity of an inferiour Biſhop, is uſually to the Archbiſhop, the Metropolitan of the Province, where the See of the Biſhop is voide. But if ſuch Nomination or preſentment be made by the Kings Majeſty for default of Election of the Deane and Chapter unto the office or dignity of an Archbiſhop, then the King by his Letters Patents, under the great Seale, doth nominate or preſent ſuch perſon as he ſhall thinke good to have the dignity unto one Archbiſhop and two other Biſhops, or elſe to foure ſuch Biſhops of the Realme as ſhall be aſſigned by his Majeſty. But if the Deane and Chapter doe after the Licence and Letters Miſſive to them directed and delivered

vered, elect the perſon nominated in the Letters Miſſive; Then is the Election well made, and upon Certificate made of ſuch Election unto the Kings Majeſty, under their common Seale, the perſon elected is reputed and called Lord Biſhop Elect.

By this Election hee is not abſolute Biſhop to all purpoſes. He is a Biſhop *nomine* onely *non re*, *Non habet poteſtatem Iuriſdictionis neque Ordinis*. He is called Lord Elect, and is but as *Embryon in ventre*, till his Confirmation or conſecration. For if a Man be but elected Biſhop, if there be cauſe for to bring a Writ of Right in the Court of a Mannor belonging to the Biſhopricke; the Writ ſhall not be directed *Epiſcopo* but *Balivis*, of the Biſhop elect. Neither doth Election of any parſon to ſuch an Archbiſhopricke or Biſhopricke, if he were before Parſon or Vicar of any Church, or Deane of any Cathedrall Church, or held any other Dignity, make the firſt Benefice, Deanery or Dignity to be *ipſa facto* void in Law. For it hath bin adjudged that a *Comendam retinere*, ſuch Parſonage, Vicarage, Deanery or other Dignity which

he had before hee was elected comes time enough, *Trinit.* 11. *Iacobi* in Common Plees, in *Colt* and the Bishop of Coventry and Lichfeilds case, and *Pasc.* 3. *Caroli* in the Kings Bench in *Evans* and *Afevels* case.

9. H. 5. 13. a. If an Abbot pendant the Writ be made a Bishop, the Writ shall not abate. And election onely of one to a Bishopricke who hath a former Dignity, doth not make a Cession of it; for it would be to the prejudice of the partie.

The second thing incident to the creation of an Archbishopricke or Bishopricke, is Confirmation, Consecration and investure. This was anciently 38. E. 3. 30. done by Buls and Breves from the Bishops of Rome. But now since the Statute of 25. H. 8. *cap.* 20. The same is done by the Archbishop or Metropolitan of the Province, with such Benedictions and Ceremonies as are requisite: But it is to be noted that before any Archbishop or Bishop be confirmed, consecrated and invested, he must take an Oath of fealty to the Kings Majesty onely; and after such Oath and fealty done only to his Majesty, the King under his great

great Seale doth signifie his Election to one Archbishop and two other Bishops or else to foure Bishops within his Dominions, thereby commanding them to confirme the Election, and to consecrate and invest the person, and to use such Benedictions and Ceremonies as are requite.

After his Consecration he is compleat Bishop to all purposes, as well to Temporalties as to Spiritualties. And then hath he *plenam potestatem jurisdictionis & ordinis*. And therefore after he is consecrated, he may conferre orders upon others, consecrate Churches or Chappels. When he is Confirmed, the power of the Guardian of the Spiritualties doth cease. After he is Consecrated, he may certifie an Excomengment, for that is in point of jurisdiction, which he could not doe before his Consecration; For although by his Confirmation *Conjugium contrahetur Spirituale*; yet by Consecration *Consummitur*.

De 22.E.3.13 A writ to the Bishop Elect and confirmed to admit a Clarke, awarded good. 18.Eliz. Dy. 350; C.8. Trollops case. 41.E.3.10.

After he is Confirmed, and before he be Consecrated, the King may by his Letters Patents grant unto him the Temporalties, and such grant shall be good

41.E.3.6. 46.E.3.32.

good. But such grant from his Majesty, is *de gratia, non de jure*. But after that he is Consecrated, and installed in his Bishopricke, hee is fully enabled to sue for the Temporalties out of the Kings hands by a Writ *de restitutione Temporalium*, directed unto the Escheatour; and he shall enjoy the actuall possession of them. But yet the Temporalties are not *de jure* to be delivered unto him, untill such time as the Metropolitan hath certified the time of his Consecration, although that the Freehold of the Temporalties be in him by his very Consecration. 38. E. 3. 30.

If a Bishop of one Dioceſſe be translated unto another Dioceſſe, there needes no new confirmation, or new consecration of him; for that consecration once had is *Caracter indelebilis*. And although for cause or crime he may be deposed and removed from his See, or may be suspended *ab officio & Beneficio*, that is to say, from the execution of spirituall jurisdiction, and from receiving the profits of the Bishoprick, which are the Temporalties; yet hee still keepes and retaines the Title of Bishop; for that the Order of Bishop cannot

cannot be abſolutely taken away from him, *tamen quære, &c.*

Chap. II.

Of Deanes and Chapters, and of their Elections: How all perſons belonging to Cathedrall Churches held their poſſeſſions at the firſt together; and how, and by whom they were afterwards divided and ſevered.

EVery Archbiſhop and Biſhop hath a Deane and Chapter conſiſting of Spirituall and Eccleſiaſticall perſons. There are foure ſorts of Deans or Deaneries, of which and of whom the Law of this Kingdome take knowledge. The firſt is a Deane which hath a Chapter, conſiſting of Prebendaries or Canons. For ſeeing that it was impoſſible but that Schiſmes, Sects, and Hereſies would ariſe in the Church, it was in Chriſtian policy thought fit and neceſſary, that the burthen of the whole Church

Church and government therof ſhould not lye upon the perſon of the Biſhop onely: and therefore it was thought neceſſary that every Biſhop within his owne Dioceſſe ſhould be aſſiſted with a Councell, firſt, to conſult with them in matters of difficulty concerning Religion, and in deciding the Controverſies thereof: ſecondly, for the diſpoſing of the things of the Church, and to give their aſſents to ſuch eſtates as the Biſhop ſhould make of the Temporalties of his Biſhopricke; for it was not thought convenient that the whole charge and power thereof ſhould remaine in one ſole perſon onely, that is, the Biſhop. The Deane, which hath a Chapter, is ſet forth to be an Eccleſiaſticall Governour Secular, over the Prebendaries and Cannons in the Cathedrall Church. And the Patronage of ſuch Deanery is in the Crowne, and doth not belong unto any Subject. The ancient Deanes of Chapters come in as Biſhops doe, by a *Conge de eſlier*, and are confirmed by the Biſhop. But ſuch Deanes and Chapters which were tranſlated from Priors and Covents, or which were newly founded after the Diſſolu-

Diſſolution of Monaſteries; by King *Henry* the eight, are now Donative, and by the Kings Letters Patents they are inſtalled. The Chapter are the Prebendaries or Cannons, as before is ſaid; and is *Clericorum congregatio ſub uno Decano in Eccleſia Cathedrali.*

Some Chapters are ancient and ſome later. The later are of two ſorts; firſt, thoſe which were newly tranſlated or founded by King *Henry* the eight, in the places of Abbots and Covents, or Priors and Covents, which were Chapters whileſt they ſtood. And theſe may be ſaid to be new Chapters, but belonging to old Biſhoprickes. Secondly, thoſe are ſaid to be new Chapters, which were annexed to new Biſhopricks, founded by King *Henry* the eight, ſuch as were Cheſter, Briſtow, and Oxford.

The ſecond Deane which hath no Chapter, and yet he is preſentative, and hath cure of Soules, and hath a peculiar and a Court, where he holdeth Eccleſiaſticall juriſdiction, but is not ſubject to the viſitation of the Biſhop or Ordinary: ſuch a Deanery is the Deanery of Battell in Suſſex, founded by King *William* the Conquerour; and the Deane

there

there hath cure of ſoules; and hath ſpirituall juriſdiction within the liberty of Battell; and he is preſentable by the Patron unto the Biſhop of the Dioceſſe; and he is to be admitted into the Deanry by the Biſhop of Chicheſter, although he be exempt from the Viſitation of the ſame Biſhop. And the Patronage of ſuch a Deanery may be in a Subject, as the Patronage of the Deanery of Battell is at this day in the Lord Viſcount Mountacute.

The third Deane is Eccleſiaſticall alſo, but the Deanery is not preſentative but donative; nor hath he any cure of ſoules; but he is onely by covenant or Commiſſion; and he alſo hath a Court and a Peculiar, where he holdeth plea, and hath juriſdiction in all ſuch matters and things as are Eccleſiaſticall which ariſe within his Peculiar, which oftentimes extends over many Pariſhes. Such a Dean conſtituted by Commiſſion is the Deane of the Arches, and the Deane of Bocking in Eſſex. And of ſuch Deaneries there are many more.

The fourth ſort of Deane is he who is called Rurall Deane; he hath not any abſolute judiciall power in himſelfe,

ſelfe, but he is onely to order and to prepare the Eccleſiaſtical affaires within his Dioceſſe by the direction of the Biſhop or the Archdeacon; and is a ſubſtitute of the Biſhop in many caſes, as in granting of Letters of Adminiſtration, proving of Wils, &c. His juriſdiction was anciently great, and tooke place upon the diviſion of Dioceſſe; for as before I ſaid, the Dioceſſe of every Biſhop was divided into Archdeaconries, and they into Deaneries, which were theſe Rurall Deaneries; and theſe Deaneries into Pariſhes, Townes, and Hamlets: but the power and juriſdiction which theſe Rurall Deanes at the firſt had, is now almoſt loſt and extinguiſhed, the ſame being ſwallowed up in the Offices of the Archdeacon, and the Biſhops Chauncellour, who now exerciſe their power and authority for the moſt part throughout all the Dioceſſe of the Biſhops within England; although that in other Countries the juriſdiction of theſe Rurall Deanes is yet in force.

The Biſhop, Deane and Chapter, which were the Prebendaries or Cannons, as before is ſaid, and all other

parſons

perſons belonging unto or having any thing to doe in Cathedrall Churches, at the firſt and in ancient times held either poſſeſſions together in groſſe, but afterwards for the avoiding of confuſion, and for better order, and for ſome other ſpeciall cauſes, beſt knowne unto the Kings and State of this Realme, the ſame were afterwards by them ſevered and divided; and part of the Lands and poſſeſſions belonging unto the ſame Church were aſſigned unto the Biſhop to hold by himſelfe, and other parts thereof were aſſigned unto the Deane and Chapter, to hold by themſelves, of which Lands they have ever ſince continued ſeverally ſeiſed in their ſeverall capacities. This appeareth more plainly by the booke of 17. Aſſ. 29. Where the Treaſurer of a Cathedrall Church brought an Aſſiſe of ſome part of his poſſeſſions in his owne name, and the Defendant pleaded in barre a releaſe of the Dean and Chapter; and it was ruled to be no bar, becauſe that the Treaſurer held his poſſeſſions now ſevered from the poſſeſſions of the Deane and Chapter; & yet a leaſe made of them by the Treaſurer without the confirmation of

11.H.4.9.b. 25.Aſſ.8.pro Fiſher.

17.Aſſ.29.

of the Dean and Chapter, was not holden to be good but onely during his owne time, and not to binde his ſucceſſours. And alſo it hath bin ſeene, that the Chapter alſo hath maintained Writs of their ſeverall poſſeſſions againſt the Deane; for the Prior of Weſtminſter hath brought a Writ of *Quare impedit* for diſturbing him to preſent unto a Church which belonged unto his Priory, againſt the Abbot of Weſtminſter, as appeareth by Finchden, 40. *E.* 3. 28. wherewith agreeth the booke of 20. *E.* 3. *Fitz. Non habilitie.* 4. 17.E.3.64.b.

All Archbiſhops, Biſhops, Archdeacons, Deanes, Prebendaries, Parſons, Vicars, are ſecular parſons, and are not now Religious, although they are men of the Church. For no perſons are ſaid in Law to be religious, but ſuch as have vowed three things, *viz.* true obedience to their Soveraigne of their houſe and Order, perpetuall Chaſtity, and willfull Poverty, and which are poſſeſſed in ſome religious Order, as the Auguſtine and the Franciſcan Monkes, &c. Yet may all ſuch Eccleſiaſticall perſons ſecular hold Lands in Frankalmoigne, and Lands at this day may be given unto C.2 part. Lenef. de Cant. caſe. 21.H.7.39. 29.E.3.14.

them and their ſucceſſours, to hold in Frankalmoigne, with the conſent of the King and of the Lords mediate and immediate, notwithſtanding any Statute of *Mortmayne, quia quilibet p teſt renunciare juri pro ſe introducto.* And if they doe conſiſt of a ſole Corporation or body politicke, as Biſhop, Prebendary, Parſon, Vicar, &c. a Feofment may be made unto them of Lands in *Libera Elemoſina*, either by Deede or without Deede; and the Feeſimple of the Lands ſhall paſſe unto them without the word (Succeſſours.) But if ſuch a Feofment be made unto a Corporation aggregate, as Deane and Chapter, &c. there to paſſe the Inheritance, there muſt be the word (Succeſſours) in the *Habendum*, and the Feofment muſt be by Deede, otherwiſe it is not good in Law.

CHAP.

Chap. III.

Of the Capacities of Bishops, Deanes and Chapters, Prebendaries, Parsons, Vicars, and other Ecclesiasticall persons, to purchase, hold and grant; and of different Acts and things to be done by them and to them.

EVery Archbishop, Bishop, Archdeacon, Deane, Prebendary, Parson, Vicar, or other Corporation spirituall sole or aggregate, have a double capacity in them to purchase, hold, and graunt. If Lands be given unto a sole body politicke, as to a Bishop, Archdeacon, Prebendary, Parson, Vicar, then to give them an estate of Inheritance in his or their politique or corporate capacity, there must be these words in the Deede (*viz.*) To have and to hold unto him and his Successours; for without the word Successours, in such cases the Inheritance passeth not unto them, except as before is said, in the case of a gift Frankalmoigne; but if 7.E.3.25. 25.E.3.35. C.Litt.9.b.

Lands be given unto a Deane & Chapter, or other corporation aggregate, they may have an Inheritance or a Fee-ſimple in the thing paſſed unto them, without the word Succeſſour in the Deed; for that the body politique never dieth, but then they muſt take the thing granted in their politique capacity, and not in their naturall capacities. If the King by his Letters Patents grant Lands *Decano & capitulo de C. Habendum ſibi & heredibus & ſucceſſoribus ſuis,* 18.H.6.11. the graunt ſhall runne unto the Deane and Chapter, and his Succeſſours in their politique capacity, and not unto the Deane and his heires in his naturall capacity.

There is a great difference in things to be done by corporations ſpirituall which are ſole, and corporations ſpirituall which are aggregate of many perſons. Firſt, if a ſole corporation, as a 18.H.9. Biſhop, Prebendary, Parſon, Vicar, 11.H.7.19. &c. make a Feofment in Fee with a acc. Letter of Atturney for to deliver ſeiſin of the Lands, the Livery muſt be made in the life of the Biſhop, Prebendary, Parſon, Vicar, &c. But if a Deane C.Litt.52.b. and Chapter, or other corporation ſpirituall

rituall make a Deed of Feofment of lands with a letter of atturney for to give livery and ſeiſin. There, Livery made by the Atturney, after the death of the Deane, is good and ſhall ſtand effectuall in the Law. Secondly, a ſole corporation, as a Biſhop ſeized in the right of his Biſhopricke, ſhall doe homage, but a Parſon or Vicar, who have but a qualified feeſimple in them, ſhall neither doe homage nor receive homage; neither ſhall a Deane and Chapter doe homage, becauſe they cannot do it in perſon; and homage being a ſervice which is entire & inſeperable muſt alwaies be done in perſon. Neither ſhal a Biſhop doe Eſcuage in perſon, but he ſhall finde an able man to performe the ſervice; for it is a rule, that *Nemo militans Deo implicet ſe ſecularibus negotiis.* And the old books are, that the homag which a Biſhop, Abbot, or other man of the Church doth, is rather fealty then homage, for that there wanteth in it the words of homage, *viz. Ieo de voigne voſtre homme:* yet in the opinion of *Coke* Chiefe Iuſtice, in his commentary upon *Littleton* 65. it is homage; becauſe therein hee ſaith, I doe you homage.

L.E.1. Juris utrum. 15. 8.E.4.28. 33.H.8. br. fealty. 15. C.7.part.10. C.10.part.31. acc. C.Litt.70.b. Glou.li.9.c.1. 21.E.3.40. 16.E.3.63.

Thirdly, a corporation spirituall sole, as a Parson, Prebendary, Vicar, &c. who had not the absolute Feesimple of the Lands in them, could not have charged their lands or possessions without the assents of their Patrons or Founders.

19 E. 3. 7.
6 E. 3. 10.
9. E. 4. 6.
38. E. 3. 19.

But a Corporation aggregate of many persons, as Deane and Chapter, Master of a Colledge and Fellowes, &c. who had the absolute Feesimple of the lands in them, might have made grants, and thereby charged their possessions, or might have discontinued their lands or possessions without the assents of their Patrons or Founders.

CHAP. IV.

Of Leases made by Bishops, Deanes and Chapters, Prebendaries, Parsons, Vicars. And where their Leases are good by the Statutes of 32. H. 8. 1. and 13. Eliz and other Statutes, and where not.

EVery Archbishop, Bishop, Archdeacon, Deane, Prebendary, Parson, Vicar, and other Corporation spirituall, by

by the common Law might have made Leaſes *Concurrentibus his qui in Lege requiruntur*, for life or yeares without limitation or ſtate of time. But now by the Statutes of 32. *H.*8. 1. and 13. *Eliz.* and other Statutes, Biſhops and other Eccleſiaſticall perſons are reſtrained to make any Leaſes of the Lands or the poſſeſſions belonging unto the Church, but according to ſuch limitations, and with ſuch proviſoes as are mentioned in the ſaid Statutes.

Now by the Statute of 32. *H.*8. which is an enabling Statute as to ſome perſons a Biſhop by his Deed without the Dean and Chapter, a Parſon ſeized in Fee in the right of his Church, may make Leaſes, but with theſe cautions and proviſoes following, *viz.* Firſt, the Leaſe muſt be made in writing by deed indented, and not by word. Secondly, the Leaſe muſt begin from the date thereof or from the making thereof. Thirdly, the ancient Leaſe muſt be ſurrendred, expired or ended within one yeare at the making of the ſecond Leaſe; and ſuch ſurrender muſt be abſolute, and not conditionall. Fourthly, there muſt not be a double Leaſe in being at one

C. Litt. 44. b.

C. 5. part. b. Sir Mountjoyes caſe.

C. 5. part. 2. Elmers caſe.

C. 5 part. 3. Jewels caſe.

time. Fiftly, the Leaſe muſt not exceed one and twenty yeeres, or three lives from the making thereof. Sixtly, the Leaſe muſt be of Lands or Tenements maynorable, out of which a Rent may be reſerved. Seventhly, the Leaſe muſt be of Lands or Tenements which commonly have bin letten to farme by the ſpace of twenty yeeres next before the Leaſe made. Eighthly, there muſtbe reſerved to them and their Succeſſours ſo much yeerely rent, or more, which hath beene accuſtomably uſed to be paid for the ſaid Lands or Tenements within twenty yeeres before the Leaſe made. Ninthly, the Statute of 32. *H.*8. doth not extend to any Leaſe to be made without impeachment of waſte.

A Parſon, Vicar, &c. If they make Leaſes for one and twenty yeeres, or three lives, according to the enabling Statute of 32. *H.*8. they are out of the Statute, and their Leaſes muſt be confirmed by the Patron and Ordinary. But a Biſhop who is ſeized in the right of his Biſhopricke: A Deane of his ſole poſſeſſions ſeiſed in *jure Decanatus*: an Archdeacon ſeized in *jure Archidiaconatus*: and a Prebendary ſeized in *jure Pre-*

Prebenda; every of them are ſeized in *jure Eccleſiæ*, and are within the Statute of 32. *H.*8. and may make Leaſes with and under the proviſoes before mentioned, without confirmation.

If a Biſhop make a Leaſe for one and twenty yeeres, and all thoſe yeares are ſpent ſaving three or more; yet may the Biſhop make a new Leaſe for one and twenty yeeres, to begin from the making, according to the exception of the Statute, but not a Leaſe for life or lives; and ſuch concurrant Leaſe hath bin reſolved to be good, as well upon the exception of 1. *Eliz.* which extends to ſpirituall and Eccleſiaſticall corporations, as Deanes and Chapters, which the Statute of 32. *H.*8. did not; but then in the caſe of the concurrant Leaſe, in the Biſhops caſe, it muſt be confirmed by the Deane and Chapter.

Note that all Leaſes not warranted by the Statutes of 1. and 13. *Eliz.* ſtand good againſt the Leſſours themſelves, and are voidable onely by their ſucceſſours. But if a Deane, Prebendary, Parſon, Vicar, make a Leaſe for yeeres or life, ſuch Leaſe is now void by his death, by the Statute of 14. *Eliz.* And if

C. 3. parr. in Lincoln Colledge caſe.

P.39.Eliz.in C.1.R.Hunt & Singletons caſe.

if it be made for one and twenty yeeres or three lives, it were void by the Statute of 13. *Eliz.* if it were not according to the proviſoes and limitations before mentioned.

CHAP. V.

Of Alienation and diſcontinuance made by Biſhops, Deanes, and Chapters, Prebendaries, Parſons, Vicars, &c. where their charges or Leaſes were good at the Common Law, without confirmation, where not : and by what Statutes they are reſtrained to diſcontinue their Lands or poſſeſſions.

BY the Statutes of 1. and 13. *Eliz.* and 1. and 3. *Iac.* Biſhops and all other Eccleſiaſticall perſons are reſtrained to alien or diſcontinue any of their Eccleſiaſticall Lands or livings. And if they convey or alien any of their lands or poſſeſſions, although it be to the Kings Majeſty himſelfe, the alienation

is void in Law; for although the King be not expreſly named in the Statute of 1. *Jacob.* yet the ſame being made to ſuppreſſe alienations, diſcontinuances and wrongs, done by Clergy men unto their ſucceſſours, the King is included in the generall words of the Statute (perſon or perſons.)

C. 11. part. in Magdalene Colledge caſe, acc.

If a Biſhop had bin Patron of a Church, the Biſhop could not have made any grant of the parſon of lands of his parſonage good, either by licenſe precedent the grant, or by his confirmation ſubſequent the grant, which ſhould have bounden the ſucceſſours of the Parſon, without the confirmation of the Deane and Chapter. But if there had bin Parſon Patron and Ordinary, and the Patron and Ordinary had given licence by their Deed to the Parſon, to have granted a rent charge out of the glebe, and the Parſon had made ſuch a grant; this ſhould have bounden the Succeſſors of the Parſon at the Common Law, before the reſtraining Statutes, although it had not bin confirmed afterwards by reaſon of the Licence precedent. And in that caſe the Ordinary alone might have agreed to ſuch a grant of a rent by his

11. H. 6. 9. 31. H. 8. br. charge 40.

C. Litt. 300. b.

7. H. 4. 15. b. per Curiam.

his Licence precedent, or confirmation subsequent, without the confirmation of the Deane and Chapter; because that in that case the Dean and Chapter had not to doe with any thing that the Bishop did as Ordinary; for that did not concerne their possessions: but in that case the confirmation or licence of the Patron had not bin good to have made the charge perpetuall upon the Church, unlesse the Patron had a fee-simple in the Patronage, which if he had had, then the grant of the rent by the Parson *concurrentibus his*, &c. had bin good, and should have charged the Lands, and should have bounden the successours of the Parson at the Common Law before the restraining Statute.

31. E. 3. Iust. 61. 16. Ass. 31.

Now *Confirmare*, or a confirmation is but *firmam facere*, and as it were but an assent to the Act and Deed of the Bishop, Parson, &c. And therefore although the confirmation had not bin alwayes of the Estate; yet if it had bin but of the Deed of the Bishop, the same had bin sufficient: and therefore if a Bishop, before the said restraining Statutes of 1. *Eliz.* and 1. *Iac.* had made a feof-

7. H. 4. 15.

feoffment in fee of lands parcell of his Biſhopricke, and the Deane and Chapter by their deed had confirmed the Deed of the Biſhop, the ſame had bin good, and livery and ſeiſin made upon the firſt Deed had bin good, after the ſaid Deed had bin confirmed. So if a Biſhop by deed enrolled had conveyed lands unto the King, and the Deane and Chapter had confirmed the Deed of the Biſhop, and afterwards the Deed had bin enrolled, it had bin ſufficient to have confirmed the lands unto the King, although the deed of the Deane and Chapter had not bin enrolled; for the aſſent was to be made unto the Act of the Biſhop, and to him, and not unto the King; but at this day, as I ſaid before, Biſhops cannot make any conveyances, thereby to diſinherit their Sees or ſucceſſours; yet doth not that take away the rule of Law, but that a confirmation made of the Deed of the Biſhop or Parſon at this day is ſufficient, although that the eſtate be not confirmed, which is granted by the Biſhops or Parſons deed; and therefore if ſince the Statute of 13. *Eliz.* a Parſon, Vicar, &c. make a leaſe for one and twenty yeeres,

yeeres or three lives : and the Patron and Ordinary doe confirme the deed of the Parſon or Vicar. This ſhal (as I conceive) make the leaſe good to ſome purpoſes, and ſhall be a confirmation of the leaſe it ſelfe, although that the terme be not confirmed.

C. 5. part. 15. If Parſon and Ordinary make a leaſe for yeeres of the Glebe unto the Patron, and afterwards the Patron aſſigne or grant this leaſe over unto another parſon by his deed, the aſſignment is good, and a confirmation of the firſt leaſe made unto himſelfe ; and the deed of the Patron ſhall enure to a double intent, both to make the aſſignment of the leaſe good, and to a confirmation of that leaſe to the aſſignee.

C. 5. part. 81. Fords caſe. There is a difference betwixt the confirmation of the terme, and a confirmation of the lands ; and therefore if before the Statute of 13. *Eliz.* a Prebendary had made a leaſe of lands, or the corps of his Prebend for ſeventy yeeres, and the Biſhop Patron of the Prebend and the Deane and Chapter had confirmed *dimiſſionem prædictum* for fifty yeeres, *& non ultra* ; the confirmation had extended unto the whole terme,

terme, and the words (for fifty yeares *& non ultra*) had bin void; but if the Biſhop and Deane and Chapter had rented the leaſe for ſeventy yeeres, and had confirmed the lands to them for fifty yeeres, *& non ultra*, there the confirmation had bin good for the fifty yeeres onely.

If a Biſhop hath two Chapters, as there may be two or more Chapters unto one Biſhopricke, both the Chapters muſt confirme leaſes made by the Biſhop: but if one of the Chapters after the date or making of the leaſe be diſſolved, there a confirmation made by the Chapter which is in being, is ſufficient to make the leaſe good; and in ſuch caſe there needeth not any confirmation of the King, who is ſupreame Patron, and Ordinary of all the Biſhopricks in England.

L.R.2.gr.104. 50.E.3.Aſſiſe in Statham. 11.Eliz.Dyer 282.

If a Deane of one Cathedral Church be elected Biſhop unto another See, with a Diſpenſation *retinere Diaconatum in Comendam*; if after the Biſhop of that Cathedrall Church, whereof he was the Deane, doe make a leaſe of parcell of the poſſeſſions of the Biſhopricke, the confirmation of that leaſe

leaſe by the Commendatory Deane is good, as it was adjudged in *Evans* and *Aſcues* caſe *Paſc.* 3. *Caroli* in the Kings Bench.

There is another rule in Law, that *Prælatus Eccleſiæ ſuæ conditionem meliorare poteſt, deteriorare nequit.* And therfore if a Biſhop, Parſon, &c. purchaſe lands to him and his ſucceſſors, he cannot wave the purchaſe afterwards himſelfe, but his ſucceſſour upon juſt cauſe ſhewed, *viz.* upon cauſe ſhewed, that the rent payable out of the ſame lands upon the ſaid purchaſe be of greater yearely value, then is the land purchaſed, may wave ſuch purchaſe made by his predeceſſour. And ſo if a Biſhop, Prebendary, Parſon, Vicar, or other corporation ſpirituall be ſeized of any thing in the right of their Church, they cannot diſclaime in that thing, becauſe they cannot deveſt by their diſclaimer that thing which was once ſetled in their Church: but if a *quo warranto* be brought againſt ſuch Biſhop, Prebendary, Parſon, &c. for liberties or franchiſes, in that ſpeciall caſe they may diſclaime in the liberties and franchiſes, & ſuch diſclaymer ſhall binde their ſucceſſors.

40.E.3.27.
5.E.4.1.
b.E.3.51.
20.H.6.46. per Markham.
6.E.3.52.

If

If a Bishop make any Lease, grant any rent charge, enter into any warranty, or doe any other act, or thing which tendeth directly to the diminution of any of those revenewes which ought to be, and continue for the maintenance of his Successour. If the Bishop be deposed, translated, removed or dyeth, the successour shall avoid such lease, charge, warranty, &c. But if a Bishop being Patron and Ordinary doe confirme a lease made by the Parson, without his Deane and Chapter; and after the Parson dieth, and the Bishop collate another to the Benefice, and is afterwards deposed, translated or dyeth, yet the confirmation of that lease made alone by the Bishop remains good, for that the revenues which are for to maintaine the successour are not thereby diminished.

If a Parson bring a *juris utrum* for any thing concerning the Church, and the Defendant plead in Barre the warranty of his Predecessour or ancestour, the Plaintiffe shall not be barred by such warrantie: for that the Parson demandeth the thing in the right of his Church, and in his politicke capacity: C Litt. 370. 27. H. 6. gar. 48.

and ſo it is, if the Parſon bring an aſſiſe, although that thereby he recover the lands, and hee himſelfe is to take the profits to his owne uſe; yet becauſe after the recovery, he is ſeiſed of the Freehold, whereof the aſſiſe was brought in the right of the Church, a warranty of his predeceſſour or anceſtor pleaded in barre, ſhall not bar him: the like law is of Archdeacon, Prebendary, Vicar, &c. for the poſſeſſions concerning their Archdeaconries, Prebends, or Vicarages, they ſhall not be barred by any warrantie of their predeceſſors or anceſtors.

If there be Lord, *Prior Meſne*, and tenant; the Meſne cannot be forjudged in a writ of Meſne within the Statute of Weſt. 2. cap. 9. becauſe he cannot doe any thing to the prejudice of his houſe or Church; and ſo is the law of a Biſhop, Parſon, Vicar, &c.

A Prebendary, Parſon, Vicar, &c. for the benefit of their Churches ſhall be eſteemed to have the Feeſimple of the lands or glebe in them, for they ſhall have and maintaine an action of waſte for waſte committed in the ſame, and in the writ it ſhall be ſaid that it was *ad exhe-*

exhæredationem Ecclesiæ. But a Parson, Prebendary, Vicar, cannot discontinue the Fee; and if they make Leases for yeeres, reserving rent and dye, the leases are now void by their deaths; and no acceptance of rent by the successor shal make such void leases good: otherwise it is, if they make leases for lives, there the acceptance of the rent by the successours, will make the leases good, because the leases were not void, but voidable onely. But if a Bishop, Abbot, Prior, &c. make leases for yeeres, and dye, and the successour doe accept of the rent, they shall never avoid the leases, for the leases were not void but voidable; but all leases made by them at this day, must be with and under the provisoes in the precedent chapter mentioned, otherwise the leases will not be good.

Chap. VI.

Of Advowsons, how they are either appendants or in grosse; to what things they may be appendants, whereupon discontinuance of the Mannors or lands to which they are appendant: the Patron may present before he recontinue the Mannors or lands, where not.

AN Advowson or Patronage is a right to present unto the Bishop or Ordinary a fit person to be admitted and instituted into an Ecclesiasticall or spirituall living, when the same shall become void. It is called sometimes *Advocatio*, signifying an avowing and taking into protection: sometimes *jus Patronatus*. *Jus Patronatus est jus presentandi Clericum ad Ecclesiam vacantem, ex gratia et concessione qui consentiente Episcopo vel instruxit, vel dotavit Ecclesiam.* He that doth present is Patron; thus by *Bracton* described, *Advocatus est ad quem pertinet jus Advocationis alicujus Ecclesiæ ut ad Ecclesiam nomine*

Vide Cowell title Patrons

Bracton, lib. 4. fol. 240. C. Litt. 17.

mine proprio non aliene poſſit preſentare. Patrons were called either *Advocati*, becauſe they did defend the eſtate and cauſe of the Church, as Advocates doe the cauſes of their Clients; or, *Patroni, a Patrocinio*, from defence, becauſe they were the Founders, Benefactors and defenders of the Church, and firſt endowed the ſame with lands and livings. And therefore ſaith one, *Patronus tenetur protegere Eccleſiam, & reparare ſi minitetur ruinam, & de bono ſacerdote providere.* And hence cometh that old verſe:

Patronum faciunt dos, ædificatio, fundus.

Advowſon generally taken, is a right of preſentation or collation unto any Church, Chappell, or Chauntry, either preſentative, collative, donative, or elective, and may be attributed unto all things, whereof a man may have a *quare impedit*, if he be diſturbed, as appeareth by the Statute of Weſt. 2. ca. 5. C.Litt. 119.

If a man have a Chauntry which is donative by Letters Patents, if he give this to a Clarke, who is diſturbed by another, the Patron ſhall have a *quare* 19.E.3.12. F.N.B.33.r.

impedit of this Donative, or a *quod permittat ipſum preſentare ad Cantariam.* But in a narrower and more ordinary conſtruction, *Advowſon* is a right of preſentation to a Church Parochiall, whereof there is an Incumbant who hath cure of ſoules, called alſo a Rectory, which may be either a Parſonage or Vicarage.

Dr. & Stud. 111. a.

Now although, as hath bin ſaid, an Advowſon be but a right of preſentation, yet is it in the account and judgement of the Law, a temporall inheritance which ſhall deſcend to the heire, and be conveyed, bargained and ſold as other temporall inheritances are: and a man hath as abſolute property and ownerſhip in the ſame, as he hath in any other lands, tenements or hereditaments whatſoever; for although he cannot count in pleading, that he is ſeiſed thereof in *Dominico ut de feodo*, for that it is an inheritance incorporeal and ſavoureth not *de Domo*, yet may he in pleading count that he is ſeiſed thereof *ut de feodo, & jure.*

7. E. 3. 63.

34. H. 6. 24. 19. E. 3. Q. I. 154.

C. Litt. 17. b. 201. a. acc.

That an Advouſon is a temporall inheritance, appeareth by theſe reaſons amongſt many others. Firſt, ſome books and

and authorities are, that an Advouſon may be parcell of a Mannor, which is a temporall inheritance, and by the grant of the Mannor *cum pertinentiis*, ſhall paſſe. If a man be bounden in an obligation to enfeoffe I.S. of the Mannor of Dale, to which Mannor there is an Advouſon then appendant; and afterwards he grant away the advouſon, and then enfeoffe I.S. of the Mannor, the Obligation is forfeit. Secondly, it lyeth in tenure, and may be holden either of the King, or of a common perſon; for the Lord may diſtreine for the ſervices in the Glebe the Beaſts of the Patron, if they come and they finde them there, but not the cattle of a ſtranger. In a writ of right of Advouſon, the proces is *Grand cape* and *petit cape*; and the tenant ſhall be ſummoned in the Church: it may be ſeiſed into the Kings hands. If an Advouſon appendant to a Mannor be ſevered, after ſeverance it may be holden *pro particula*; a writ of *Ceſſavit* lyeth of it; and the writ of right of Advouſon doth ſuppoſe a tenure; for the words of the writ are *quod clamat tenere*. Thirdly, by the Law, a *precipe quod reddat* lyeth thereof. Fourthly, of

45. E.3. 22.
5. H.7. 18.
33. H.6. 33.
9. H.6. 28.
38. H.6. fo. Abbot de Spoſes caſe.
10. H.7. 19. per Keble.
P. 28. Eliz. in Com. B. adjug.
10. H.7. 19. per Vaviſour.
24. E.3. 69.
21. E.3. 35.
33. H.6. 34.
15. H.7. 8.
5. H.7. 38.
33. H.6. 35.
24. E.3. 46. 2.
22. E.3. ceſſavit. 46.
43. E.3. 15. b. acc.
33. H.6. 35. 1. per Hengiſton
15. H.7. acc.
15. H.7. 8.
20. E.4. 15. b.

Perkins 66. a. 19.E.3.Q.I. 154. 7.E.3.66. 3.H.7.5. 5.E.4.7. C.Litt.169.a. 13.E.2.Q.I. 170. C.Litt.164.b. 5.H.7.8. 34.H.6.40. 11.H.4.54. 8.E.2.preſentment 10. C.Litt.69.a. 27.E.3.5. 31.E.3.eſtoppell. 5.H.7.35.

an Advouſon, the wife ſhall be endowed, and ſhal have the third preſentment; and thereof alſo ſhall the husband be tenant by the curteſie of England. Fiftly, there ſhall be a *poſſeſsio fratris* of it. Sixtly, it may be divided betwixt coparceners, either by word or by writing, and the eldeſt coparcener ſhall have the firſt preſentment; or given in exchange for other temporall inheritances. Seventhly, although it be not valuable in it ſelfe, after the Church is once void, and therefore ſhall not be accounted for by the Guardian in Socage, becauſe he cannot take any thing for the preſentment, yet is it valuable to the Incumbent, and it hath bin accounted Aſſets in a Formedon: and it is ſome benefit to the Patron to preſent his friend to the Church, in which preſentment if he be diſturbed, he ſhall in a *quare impedit* brought by him recover damages. *Vide* 8.E.2. *recovery in value* 11. *ſi home vouch in breve de droit de e. advowſon, & vouchee perd per default, le vouchee rendra in value alt pur theſcun marke* 12 d. *ſolenque le value del Eſſleſs*. Eightly, by the grant of all lands and tenements an Advowſon wil paſſe,

Vide Dodd. 20.b.

and

and although it paſſe not by Livery and feiſin (although that ſome authorities are that it may paſſe by livery of the ring of the Church doore, yet it is tranſferrable as al other temporal inheritances are, and the delivery of the Deed ſhall be in lieu of a livery.

43.E.3.1. 6.H.7.3. per Townſend. C.Litt.335 b. C.Litt.49.2.& 58.acc.

All Advowſons are either appendants (which are ever by preſcription) or in groſſe, or ſometimes appendant, ſometime in groſſe *alternis vicibus*. If they be appendant they muſt be appendant to things of a ſuperiour nature, and which may have a perpetuall ſubſiſtance or continuance, and muſt agree in quality with the things whereunto they are appendant. And therefore an Advowſon cannot be appendant to rents or ſervices which may be extinguiſhed or diſcharged; but may be appendant to the demeaſnes of a Mannor which may have continuance for ever. So Advowſons being inheritances incorporeall, cannot be appendants to Offices, Fayres, Markets, or other inheritances which are incorporeall; but unto Honours, Caſtles, Mannors, Lands or other inheritances corporeall they may be appendants. An Advowſon originally

5.H.7.9. 3.H.7.4.& 5. 10.H.7.15. 5.E.6.Dy.70. C.Litt.122. C.4 part. in Ferringhams caſe.

ginally cannot be ſaid in ſtrictneſſe to be appendant to a Houſe for habitation; neither can one Church or Chappell be appendant to another Church or Chappell; yet by a ſecondary meanes they may be appendants unto them; as if an Advowſon be appendant to Lands parcell of a Mannor; if a Houſe, Church, or Chappell be built upon the ſame Lands, the Advowſon is now ſaid to be appendant to the houſe, Church, or Chappell; an Advowſon may be appendant to a Rectorie, and all Advowſons of Vicarages which were originally endowed out of Parſonages, and of which the Parſons are now the Patrons, are for the moſt part at this day appendant to the Parſonages, be they Impropriations or otherwiſe.

18. Eli. Dy. 350. C. 10. part 64. in Whiſler's caſe.

Secondly, Advowſons are ſaid to be in groſſe, when either by grant or by conveyance, or by deed, they are excepted, ſevered or divided from the Mannors or Lands whereunto they were before appendants; for by the exception the appendancy is deſtroyed, and the Advowſon is become in groſſe. *Bracton, ſi partem tundi dede it quis*

quis, quamvis cum omnibus pertin. ſuis, & pars retinuerit, non propter hoc transfertur Advocatio ſedeum donatore remanebit, licet minimum partem fundi retinuerit, non enim transfertur cum aliqua parte fundi, niſi ſpecialiter tranſfertur.

And yet thirdly, in ſome reſpects by act of the Law, an Advowſon may at one time be appendant, and at another time in groſſe. As if a Mannor be divided betwixt Copareeners, and every of them hath a part of the Mannor allotted unto them, without ſaying any thing of the Advowſon, the Advowſon remaines in coparcenary in groſſe; and yet in every of their turnes it is appendant to that part of the Mannor which they have. *Si home ſoit ſeiſie dun Mannor a que Advowſon eſt appendant, ſi eſtre ley ſine del Advouſon al ceſtuy que eſt ſeiſie del Mannor & Advouſon, & le Conuſee grant al Conuſor que il preſent cheſcun ſecond avoydance; per ceſt fyne, le Advouſon in reſpect de ceſtuy ane ad le Mannor & appendant mes in reſpect del Conuſor al cheſcun ſecond Avoydance ceo eſt Advouſon in Groſſe.* So if a man be ſeiſed of foure Mannors, to one of which

13. E. 3. Q. I. 170.
45. E. 3. 35.
31. E. 3. Q. I. 18
C. Litt. 122.
19. E. 3 Q. I. 59

which Mannors there is an Advowſon appendant, and hath iſſue foure daughters, and they make partition of the Mannors without mentioning of the Advowſon, the Advowſon is become in groſſe; and yet if all the ſiſters ſhall dye except ſhe to whom the Mannor was allotted, to which the Advowſon was appendant, the Advowſon is become againe appendant unto that Mannor: but if upon ſuch partition had bin made an expreſſe exception of the Advowſon, the ſame had remained in coparcenary in groſſe.

C.Litt.122.1.

31.H 6.32.
38.H.6.9.

As Advowſons appendants may be made by conveyance and exception to be diſappendant and in groſſe; ſo likewiſe they may be ſevered and divided by tortions and unlawfull Acts; as by a diſcontinuance of the Mannors or Lands to which they are appendants; by diſſeiſins, uſurpations, &c. in ſome of which caſes, although the Church become void, yet they that have the true right for to preſent, ſhall not preſent unto the avoydance, untill they have recontinued the Mannors or Lands; and in other caſes they ſhall preſent without any entry made or recon-

any recontinuance of the Mannors or Lands.

If a man be seised of a Mannor unto which an Advowson is appendant; if he be disseised of the Mannor, and the Church become void, he may present unto the Avoydance, before his entry, or before he recontinue the Mannor or Lands, because in that case his entry was lawfull; but if the disseisee dye seised, and the Church become void, there the disseisee shall not present unto the avoydance, untill he hath recovered or entred into the Mannor; for it is a rule that a man shall never be admitted to the accessary or the appendant, where he hath no right unto the principall, and his right in that case was bound by the discent: but if a man be once admitted to the principall, there he shall be admitted to the appendant, although the same were severed before by discontinuance or wrong. As if a man be seised of a Mannor to which an Advowson is appendant, if the disseiser present, and his Clarke be admitted, Instituted and Inducted, the disseisee shall not have a *quare impedit*, and recover the presentment, before he hath first entred

5.H.7.35. C.3.part. in le Marquis de Wintons case. 24.h.8.Dy.9. C.Litt.122.

33.h.6.33.acc.

entred into or recovered the Mannor; but if the Church shall againe become void, the usurpation had and made by the disseisour hath not gained such intereſt in the Advowſon, but that the diſſeiſee after his entrie or his recontinuance of the Mannor, may preſent to the avoydance, becauſe the former preſentation or uſurpation by his entrie was defeated.

17.E.3.3.Dar. preſentment 9 F. N. B. 3.32.

If the husband and wife be ſeiſed of a Mannor unto which an Advowſon is appendant in the right of the wife, and they preſent; and afterwards the husband alien one acre of the lands with the Advowſon unto B. in Fee, the Church doth void, B. preſents, and afterwards dyeth, and his heire enters into the acre, and then the husband dyes, and the Church doth become void againe; the wife ſhall not preſent untill ſhe hath recontinued the acre by her *Cui in vita*, becauſe the Advowſon was appendant to the acre; but if the Advowſon had bin ſevered from the acre, and bin in groſſe: as if B. or his heire had aliened the acre, except the Advowſon, and then the husband had dyed, and the Church had become void,

void, the wife should have presented to the same avoydance; and if she had bin disturbed, she should have had and maintained a writ of *quare impedit* upon such disturbance, but an Assise of Darrein presentment she could not have had or maintained, but a *quare impedit* she might, because she had no other remedy. But *vide*, That at this day, by the Statute of 32. H.8. the wife or her heires may present without recontinuance of the Mannor; for that such alienation, feoffment, act, &c. made by the husband, shal not be any discontinuance, or be prejudiciall to the wife.

If a man have three avoydances granted unto him at one time, to take effect one after the other; the Church becomes void, and the grantor presents his Clarke, who is admitted, instituted and inducted; and then the Church doth become void againe, the grantee shall present unto the second avoydance; because the first presentation by the grantor did not take the effect of an usurpation, to put the grantee out of possession. So it is, if A. be seised of a Mannor whereunto an Advowson is appendant, a stranger usurpes to the Advow-

H.18.Eliz.in Com.B.adjug. acc.

C.Litt 36, 8 E.2. Q.1. 199. 19.H.6.3

14. h.6.15. 26. h.8.4. Advowſon; if the diſſeiſee enter into the Mannor, the Advowſon is recontinued againe which was ſevered by the uſurpation. So if tenant in tayle be of a Mannor to which an Advowſon is appendant, and hee doth diſcontinue the Mannor, and the diſcontinuee granteth away the Advowſon in Fee, and dyeth, and the iſſue in tayle recontinueth the Mannor by his recovery in a Formedon, he ſhall be remitted to the Advowſon, and ſhall preſent when the Church doth become void.

33.h.8.Dy.48. 5.h.7.38.

C.Litt.363.b. If the Patron be Outlawed, and the Church become void; and afterwards a ſtranger doth preſent his Clarke by uſurpation, and ſixe moneths paſſe, and afterwards the King being entitled, by reaſon of the Outlawry, brings a *quare impedit* againſt the Incumbent, who is in by wrong, and removes him; by this the Advowſon is recontinued againe to the rightfull Patron, of which he was ouſted by the uſurpation; and after the Outlary reverſed, he ſhall preſent, if the Church doe againe become void.

CHAP.

CHAP. VII.

Of the Incidents to Advowson; of Presentation, and the difference betwixt Presentation and Nomination.

IT remaineth now, that we having considered an Advowson generally, enter into the particular parts thereof. It is first therefore to be knowne, that Presentation is the principall incident and chiefest quality unto Advowson, which considered in it selfe, is nothing else but the Nomination of a fit Parson unto the Bishop, or Ordinary of the Diocesse, to be by him admitted & instituted into the Benefice. Note, the profit and commoditie of the Advowson is the Nomination; and by grant of the Nomination, the Advowson passeth. *Et vide Com. in Smith. & Stapletons case. Fine levied del nomination de bon barre. vers lissue in taile del Advows. devis. 32. H.8.* Presentation and Nomination are Synonima, and commonly taken in Law for one thing, yet sometimes they are distinguished; and therfore if one man 17.E.3.64.b.

14.E.4 2.b. 21.H.6.17.2. F. N.B.33. b. 2.H.8.161. in Kelloway. 1.H.5.2.Q I. 110. Plo.Com.529

hath the Nomination, and another man the Preſentation, he that hath the Nomination is adjudged the Patron of the Church, and ſhall have a *Quare impedit ipſum preſentare ad Eccleſiam*; and that which the preſentor doth, he doth but as ſervant to him who hath the Nomination. But if a man grant to I.S. that he ſhall nominate to him two Clarkes, of which he ſhall preſent one to the Biſhop, he that is preſentor is the Patron, becauſe of the Election which is in him.

This Preſentation or Nomination (call it what you will) is but in effect the offering of the Clarke unto the Biſhop, to be by him admitted and inſtituted into the Church. It is not by a Deed, but it is by an inſtrument in the nature of a letter Miſſive, directed unto the Biſhop; and it is but the Patrons commendations of his Clarke to be inſtituted into the Church: which Miſſive or commendatory Letters are uſually in this or the like forme, *viz.*

Reverendiſſimo in Chriſto Patri & Domino, Domino W. permiſſione divina Eboracenſis, Archiepiſcopo Angliæ Primati & Metropolitano ejuſve in abſentia Vica-

Vicario ſuo in rebus ſpiritualibus generali præmbilis T. S. Baro de P. verus & indubitatus Patronus Rectoriæ Eccleſiæ parochialis de H. ſalutem in Domino ſempiternum, ad Eccleſiam parochialem de H. prædictam veſtræ Dioceſis, modo per mortem T. R. vacantem, & ad meam præſentationem pleno jure ſpectantem dilectum meum in Chriſto T. H. ſacræ Theologiæ profeſſorem Paternitati veſtræ preſento (or *cõmendo*) *humiliter ſupplicans ut præfatum T. H. ad dictam Eccleſiam admittere ipſumque in Rectoriam ejuſdem Eccleſiæ inſtitui & induci facere cum ſuis juribus & pertinentiis univerſis, cæteraque omnia & ſingula peragere & adimplere in hac parte quæ ad veſtrum munus Epiſcopale pertinere videbantur diguemini cum favore: in cujus rei, &c.* And this Preſentation, Nomination or commendation may be as well by word as by writing, both in the caſe of the King and of a common perſon.

In 11. *Iacobi* in the Court of Common Plees, it came in queſtion, Whether a preſentation made by the Kings Majeſty unto an Advowſon appendant unto a Mannor, parcell of his Dutchie of Lancaſter, under the great Seale of

11. Iac. in Co. B. Roy & Lenef. de Lincolnes caſe.

England were well made or not, and whether the same ought not to have bin under the Seale of the Dutchie; and it was resolved and adjudged by the whole Court, that the Presentation was well made; for that the presentation was but the Kings commendation of his Clarke to the Bishop, and was not any interest of the inheritance of the Advowson, but onely it was a thing concerning the Advowson, and but as a flower fallen from the stocke which did not now participate of the root. 29.E.3.Q.1. Secondly, for that the King might have presented by word onely, and therefore *à fortiori*, a presentation under any of the Kings Seales, the great Seale, privy Seale, privy Signet, Seale Manuell, or other Seales, must needes be good and sufficient. And there the case betwixt the King and the Bishop of Chichester, M.8. *Iac.* in the Common Plees was affirmed for Law, That where the King had an Advowson, in the right of his Ward, and presented unto the Advoydance under the great Seale, that the same was well made, although it were not under the Seale of the Court of Wards; for that the King might present

by

by word onely, and his preſentation was but his commendation of his Clark unto the Biſhop. And *Stephen Gardyners* caſe was then vouched by *Coke* chiefe Iuſtice, where the preſentation of *Stephen Gardyner* unto the Deanery of Norwich was good, although the King in his preſentation did miſtake and miſrecite the name of the Foundation of the Deanery; for that his preſentation was but his commendations of the Dean, and touched not the inheritance of the Deanery.

If the Lord preſent his Villeine unto the Church of Dale, which is void; it is no Enfranchiſement or Manumiſſion of him. And ſo it is if the Leſſor doe preſent his Leſſee for yeeres, to an Avoydance, the ſame is no ſurrender of his Terme, although that the Leſſee accept of the Preſentation; for that preſentations are but commendations, which are revocable and are not valuable: and therefore they ſhall not be Aſſets to Executors, or Adminiſtrators. And therefore if a Church become void in the life of a Biſhop, and ſo remaine till after his deceaſe, and the temporalties of the Biſhop be in the

Topsfields caſe in 5. Eliz.

Kings hands, the King ſhall preſent unto the avoydance, and not the Executours or Adminiſtratours of the Biſhop.

Thus may you ſee what a Preſentation or Nomination, conſidered in it ſelfe, as a fruit fallen from the ſtocke, and *pro hoc vice* is: and of what force and eſtimation it is in the judgement and eye of Law. But conſider it again as a right, it is an hereditary quality incident to the Advowſon or Patronage, of ſome value, eſteeme and benefit unto the Patron, the ſame being a power in him to preſerve and enable his friend unto a Benefice, whereof the Patron himſelfe perhaps is not capable; in which preſentment if he be diſturbed he ſhall in a *Quare Impedit* brought by him recover damages, as before is ſaid.

CHAP.

CHAP. VIII.

Who may preſent unto Beneſices with Cure. What perſons are capable of Preſentation. To whom the ſame muſt be made. What are ſufficient cauſes for the Ordinary for to refuſe the Clarke preſented. Where hee muſt certifie the cauſe of his refuſall; and where he muſt give notice thereof, where not.

HAving ſet forth what preſentation is, it neceſſarily followeth, that I declare briefely: Firſt, who may preſent to any Church, Chappell, or Benefice with cure of Soules. Secondly, what perſons are capable of ſuch preſentations, what not: and for what cauſes the Ordinary may refuſe the Clarke preſented. Thirdly, to whom, and at what time the preſentation muſt be made, and to whom Lapſe ſhall incurre for want of preſentation.

For the firſt, an Alien borne ſhall not preſent in his owne right, but if he purchaſe

chaſe an Advowſon, and the Church become void, after Office found that he is an Alien, the King ſhall preſent; but
33.E3.Q.I.46 an infant under the age of one and
8. E4.4. twenty yeares, may preſent in his own
9 H.6.5. name and right; and if he doe not pre-
17.E.3.9. ſent within ſixe moneths next after the Church ſhall fall void, Laches ſhall be imputed unto him. A *Feme Covert* cannot preſent by her ſelfe, but her huſband ſhall preſent, and he may preſent either in his owne name, without naming the wife, or elſe in his and his wives name together. But the wife of
10.E.3.27.b. the King is as a *feme ſole*, and is exempt
31.E.3.Q.I. from the perſon of the King, and is of
146. ability to grant or to preſent unto any
3 H 7. 14. Church or Advowſon: and in a *quare*
18.E.3.2. *impedit* brought by her Plenarty by pre-
18.E.3.32. ſentation of another, is no good bar a-
24.E.3.35. gainſt her, no more then it is in caſe of the King.

If a Villeine purchaſe an Advowſon, and the Church void, the Lord of the Villeine ſhall preſent; for upon ſuch purchaſe made, the Lord may come and claime the Inheritance of the Advowſon, and by ſuch claime the Advowſon ſhall be veſted in the Lord; and upon the

the avoydance of the Church, the Lord in his owne name and right ſhall preſent; The Guardian in Socage ſhall not preſent unto an avoydance, in the right and name of the heire, becauſe he cannot account for the avoydance, for he cannot make any profit thereof, for that would be Symony, and ſo make his preſentment void. Neither ſhal the Patron in a writ of right of Advowſon alledge Explees, or taking of the profits in himſelfe, but in his Incumbent: yet *Birry* ſaith 14. E.2. *Dr. in preſentment* 19. that hee hath ſeene the Guardian preſent in the name of the heire, with which agreeth the opinion of *Grene*, 20. E.3. *Barr. preſentment. Quære*, for the bookes muſt be intended of a Guardian in Chivalry, and not of a Guardian in Socage, as I conceive. Men Outlawed or Excommunicate, &c. may preſent, and their preſentments ſhal ſtand good; untill they be avoided by plea. And generally all perſons who have ability to grant or purchaſe, have ability to preſent unto any Benefice with cure of ſoules.

8. E. 2 preſentment 10.
7. E. 3. 34.
27. E. 3. 5.
7. E. 3. 63.
21. E. 4. 1. b.

Secondly, No perſon whatſoever is capable of a Preſentation unto a Bene-

fice

fice, with cure of ſoules; but ſuch a perſon as is *infra ſacros Ordines*, and is of the age of three and twenty yeares. Nor is any Lay perſon whatſoever to be preſented unto any Benefice, with cure of ſoules; but ſpirituall and Eccleſiaſticall perſons within Orders, although they be Aliens borne, may be preſented, and are capable of Benefices, with cure of ſoules within England.

Vide Stat. 13. H. 2. Raſtall France. 1.

There was an old Statute, that no Frenchman, although he were made a Denizen, ſhould be preſented unto any Church or Benefice within the realme of England. This Statute was made in the time of warre betwixt the two Realmes of England and France; but that Statute is not now in force, there being peace betwixt the Realms.

Vide Stat. 1. H. 5. cap. 7.

M. 3. Car. in Co. B. Doctor Searons caſe.

If a man be *ante natus*, borne in Scotland before the Vnion, he is capable of a Benefice in England; and ſo if hee were borne in Flanders, Spaine, or any other kingdome, friend and in league with the King of England; and ſuch Incumbent ſhall maintaine any action, reall, perſonall, or mixt, for any thing concerning the Glebe, or the poſſeſſion of his

C. Litt. 129. 40. E. 3. 10.

his Church, as *Prior Alieni* here might have done; for although he be an Alien borne out of the Kings Dominions, yet hee bringeth his action not in his owne right, but in the right of his Church; not in his naturall, but in his politique capacity, and therefore the action will lye.

If a Clarke be by the Patron preſented to the Biſhop, and the Biſhop doe refuſe for to admit and inſtitute him into the Benefice, the Biſhop muſt ſhew the particular cauſe why hee refuſeth him, and muſt not ſhew generally, that the Clarke preſented unto him is a man unfit, incapable, or criminous, but muſt certifie the particular inability, crime or incapacity.

A. being ſeiſed of the Mannor of Dale, unto which an Advowſon was appendant, the Church became void, and A. preſented I.S. to the Biſhop, Ordinary of the place, who refuſed for to admit him into the Benefice; and therupon A. brought a *Quare Impedit* againſt the Biſhop, who pleaded that upon his examination of I. S. hee found him for to be *Scſmaticum inveteratum*, and for that cauſe, by the Lawes of the Church

C. 5. part. 58. Specots cale.

Church to be *perſonam inhabilem & minime idoneam ad occupandum aliquod Beneficium cum Cura animorum*; by reaſon wherof he refuſed for to admit him into the Benefice: and it was adjudged by the whole Court of Common Plees, and afterwards affirmed upon a Writ of Errour brought in the Kings Bench, that the plea of the Biſhop was inſufficient, becauſe hee ſhewed generally that I.S. was *Sciſmaticus inveteratus*, which was altogether incertaine; and the ſpeciall crime or cauſe of his refuſall ought to have bin alledged by the Biſhop, that the party might anſwer thereunto, and ſo that he might either traverſe the cauſe, or take iſſue thereupon.

9. Eli. Dy. 254 In 9. *Eliz. Dyer* 254. the Biſhop of Norwich refuſed for to admit of a Clark into a Benefice, becauſe he was a common haunter of tavernes, and a player at unlawfull games: and it was adjudged that they were no ſufficient cauſes of refuſall; for although they were offences prohibited by the Lawes of the Realme to ſome perſons, and at certaine times, *mala prohibita*, yet were they not *mala in ſe*, for which a Clarke ought

ought to be refuſed, or for to be deprived; if he were admitted. But if the Clarke preſented be Miſcreant, Turke, Iew, Heretique, Sciſmatique, perjured perſon, baſtard, villeine, *utlage*, illiterate, or a meere Lay man; theſe are good cauſes for the Biſhop of refuſall, ſo as the Ordinary upon his refuſall expreſſe the crime, or the certaine cauſe of his refuſall, upon his certificate made; and it hath bin often reſolved, that whatſoever are ſufficient cauſes of deprivation of the Incumbent, the ſame are ſufficient cauſes for the Biſhop to admit a Clarke unto a Benefice. But if the Ordinary ſhall refuſe the Clarke preſented unto him, for any of the cauſes before alledged, hee muſt give notice unto the Patron of ſuch cauſe of refuſall, that the Patron may preſent another fit Clark unto the ſame Church; for if no notice be given, and the ſixe moneths paſſe, the Lapſe ſhall not incurre to the Biſhop or Ordinary, for that he ſhall not take advantage of his owne wrong, in not giving notice thereof unto the Patron. *Nota* 18. *H.7. per Frowick, ſi le Ordinary refuſe man Clarke pur un notorious crime, come*

38. E.3.2.
5.H.7.19.
11.H.7.7.

7.Iac. in B.R. Auſtins caſe adjudge.

22 H.6.16.a.
15.H 7 8.
1.H.7.9.
12.Eliz. Dy. 293.

pur

pur ceo que il eſt common adulterer, ou murtherer, il ne temy de doner notice al Patron, cont. ſil refuſe luy pur private cauſe, come ſil ſur examination confeſſe de ſoi common adulterer, ou que il eſt uſurer.

Thirdly, the preſentation or nomination of the Clarke muſt be unto the Biſhop of the Dioceſſe, who is ſupervi-ſor (and for the moſt part) viſiter of all the Churches within his Dioceſſe, for the better ordering and governing of the ſame. He is called Ordinary, becauſe he hath ordinary juriſdiction in all cauſes Eccleſiaſticall immediate to the King, for the doing of juſtice in his Dioceſſe, *in jure proprio & non per deputationem.* It is his care to ſee that the Church be provided of an able and ſufficient man to officiate the Cure, *Habet enim curam Curuturum, viz.* to ſee divine Service ſaid, and to compell the doing of it by Eccleſiaſticall cen-ſure. And therefore all preſentations are made unto the Biſhop, or Ordinary of the Dioceſſe; but in the time of the va-cancy of the Biſhopricke, or if the Bi-ſhop be *in remotis*, about the affaires of the King or State, then the preſentati-

on

on muſt be unto the Guardian of the ſpiritualties (which commonly is the Deane and Chapter) or unto the Vicar generall, which ſupplieth the roome and place of the Biſhop. 17.E.3.23.b.

If a man do recover and have judgement given for him in a writ of *Quare Impedit*, and afterwards the Biſhop, who is the Ordinary, dye before that the Clarke of the plaintiffe be admitted into the Benefice, the Writ to admit the Clarke of the plaintiffe muſt be directed unto the Guardian of the ſpiritualties, *ſede vacante*, to give admiſſion unto him; but if before the Writ of admiſſion unto them directed be executed, another man be elected and confirmed Biſhop of that See, the power of the Guardian of the ſpiritualties doth then ceaſe, and the party that recovered in the *Quare impedit*, may have another new writ unto the Biſhop to admit his Clarke, if he pleaſe. 18.Eliz.Dy. 350.

As the preſentation or preſentment muſt be made unto the Biſhop or Ordinary, or unto the Guardian of the ſpiritualties, *ſede vacante*, or unto the Vicar generall, in the caſes before mentioned, ſo muſt it be likewiſe made within convenient time.

CHAP.

Chap. IX.

Within what time the Presentation must be made, to avoid Lapse, viz. where Lapse shall incurre for want of presentation within six moneths: how the six moneths shall be accounted; and who shall present for Lapse.

THE Law hath appointed six moneths unto the Patron to present his Clarke unto the Bishop; but if the Patron doe not present his Clarke unto the Bishop within the six moneths next after the Church shall become void, then shall the Lapse run to the Bishop, and he shall present for the default of the Patron, a Clarke of his owne choosing, and his presentation is called Collation: and if the Bishop or Ordinary shall surcease his time, and shall not Collate within the six moneths, then shall the Metropolitan (the Archbishop of the Province) collate his Clarke; and if he also doe not collate within

other

other ſix moneths; then ſhall the Kings Majeſty as ſupreame Ordinary of all the Benefices in England, preſent his Clarke to the Church; but there is notwithſtanding great care to be had, and it is to be known, how, and after what manner the Church doth become void, for accordingly the ſix moneths ſhall be accounted.

If the Church ſhall become void by the death of the Incumbent, then the ſix moneths ſhall be accounted from the time of his death, of which the Patron at his perill is to take notice, and to make his preſentment unto the Biſhop accordingly: and ſo is the Law taken to be. If the Church doe become void by Creation, *viz.* by making of the preſent Incumbent thereof a Biſhop, or by Ceſſion, whereof the Patron at his perill is likewiſe to take notice. But if the Church doe become void by Reſignation, which is the Act of the Incumbent himſelfe (and which Reſignation muſt be made unto the Biſhop or Ordinary,) Or by Deprivation, which is the act of the Law, there although the ſix months doe incurre before the Patron preſent, yet the Biſhop or Ordinary ſhall not

18.H.7.49.in Kelloway, acc. 5.E.4.3. 16.El.Dy.327 13.Eliz.Dy. 293. 1.H.7.9.

preſent, unleſſe the Biſhop upon the reſignation or deprivation had given notice unto the Patron of the ſame avoydance: for in ſuch and the like caſes the ſix moneths ſhall be accounted from the time of the notice given to the Patron by the Ordinary of the Reſignation or Deprivation: but if the Church doe remaine void by ſix moneths after the death of the Incumbent without any preſentation made unto the ſame by the Patron; or by ſix moneths after ſuch time that the Biſhop or Ordinary hath in the caſe of Reſignation or Deprivation given notice thereof unto the Patron, and the Biſhop doth collate his Clarke by reaſon of the lapſe come unto him, and before his Clarke be inducted, the Patron doth preſent his Clarke to the Biſhop, the Biſhop may refuſe for to admit the Clark of the Patron, for that title to collate was rightfully and lawfully come unto him.

14.H7.21.

If the Church be void, and the Patron preſent his Clarke unto the Ordinary, who refuſeth for to admit him, untill he hath examined him of his ability; and a moneth or two after the preſentment, upon examination the Clarke be

be found for to be criminous or unable to ſerve the cure, and afterwards lapſe incurre, the ſixe moneths ſhall be accounted from the time of the avoydance; and if the Patron be a lay man, the Ordinary ſhall give notice unto him of the inability of the Clarke; but otherwiſe it is, if the Patron be a ſpirituall perſon, and his Clarke preſented be criminous or unable. 5.E.4.4. 8.E.4.2. 18.H.7.49. Kelloway.

If the King be Patron, and doe not preſent his Clarke within ſix moneths to the Church which is void, the Ordinary ought not *de jure* to collate for lapſe, but he ought for to ſequeſter the profits of the Church untill the King will preſent; but in ſuch caſe, if the Ordinary doe collate his Clarke, and afterwards the King preſent his Clarke to the Ordinary; the King ſhall not put out the Clark of the Ordinary without a *quare impedit* firſt brought. 14.H.7.21. per Keble. Br. preſentment 24.

But in all caſes before ſaid, the ſix moneths ſhall be accounted according to the Kalender, and ſhall not be accounted according to eight and twenty dayes to the moneth, for that the words (*tempus ſemeſtre*) in the Statute of Weſt. 2. cap. 5. ſhall have ſuch conſtruction as C.6. parte in Caesbies caſe

ſhall be for the reliefe of him that hath right, and to give him the longeſt time that may be, that he loſe not his right.

If the King hath title to preſent for lapſe, for default of the Ordinary and the Metropolitan, and notwithſtanding the Kings title, the Patron doth preſent his Clarke, who is admitted, inſtituted, and inducted by the Metropolitan, this ſhall binde the King, and the King cannot remove the incumbent without a *Quare Impedit* brought; for by the induction the Church was full, and although the ſixe moneths were not incurred, and *Nullum tempus occurrit Regi*, yet in that caſe he ſhall not preſent, or remove the Incumbent, but by a *Quare Impedit* brought againſt him.

14. H. 7. 21. per Curiam.

CHAP.

CHAP. X.

Where the King may revoke or repeale his Preſentation, where not; and where a common perſon cannot revoke or varie from his firſt Preſentment made.

IT hath bin a queſtion much controverted in old bookes, Whether if a common perſon hath once preſented his Clarke to the Ordinary, whether he may revoke the ſame, or varie from his firſt preſentment; but the better opinion of the booke hath bin, that a common perſon cannot revoke, repeale or varie from his firſt preſentment, becauſe he hath put it out of himſelfe, and hath given unto the Ordinary power to perfect what was by him begun: but if the King doth preſent unto a Church, and his Clarke be admitted and inſtituted, yet the King may before induction repeale or revoke his firſt preſentment, by preſentment of another Clarke unto the Biſhop; and the very preſentment of the ſecond Clarke, without any more

39.H 6.19.
14.E.4 2.
20.H.6.19.
31.E.1.Q.I. 185.
38.E.3. 35.
17.El.Dy.348
F..N.B.34. 5.
Bacon Maximes, acc.
7.E.4.32.
C.Litt.360.
22.El.Dy.360
25.E.3.47.
Rob.de Kelſeys caſe.
adjuge,acc.

ſignification thereof to the Biſhop, is in Law a repeale of the firſt.

17. Eliz. Dy. 339.

The Vicarage of *Yatton* in the County of Southampton came unto the Queene by Lapſe, the Ordinary of the Dioceſſe collated A. unto the Vicarage afterwards, the Queene preſented B. who brought a *quare impedit* againſt the Biſhop and the Incumbent, pendant with ſuit, A. by covin and fraud obtained a preſentation from the Queene, without making mention of the pleaſure of the Queene, to revoke or repeale the firſt preſentment; and it was holden by the whole Court that the ſecond preſentation in it ſelfe had bin ſufficient, and had bin a repeale of the firſt, if it had not bin obtained by fraud: and ſo was it adjudged in the Court of Common Plees, *M.* 4. *Iac.* in the Biſhop of Bangor and *Williams* caſe.

If the King hath cauſe to preſent by reaſon of lapſe, or otherwiſe; and preſents I. S. to the Biſhop, and before I. S. be inducted the King dyes, and the ſucceſſour King without reciting or making mention of the preſentment of his predeceſſour, preſents I. D. to the ſame Church; it was adjudged *M.* 8. *Iac.*

M. 8. Iac. in S. Calvert & Kitchins caſe.

8. *Iac.* in the Exchequer, that in that caſe the demiſe of the King did determine the firſt preſentation; for that the preſentation was but a power given to the Ordinary, which was countermandable and revocable, and by the preſentment of him I.S. had *neque Officium neque Beneficium.* Secondly, in that caſe it was reſolved, that the firſt preſentation was repealed, although it was not recited by the King, and was not within the Statute of 6. *H.* 8. *cap.* 15. that the King ought to recite the ſame, for that it was agreed, that the ſaid Statute went onely to Leaſes, and did not extend to preſentations unto Churches. 44. E. 3. 35. b.

CHAP. XI.

Of Examination of the Clarke by the Ordinary. Of Admiſſion, and inſtitution; at what time and place the ſame may be: where the Ordinarie may refuſe to admit the Clarke, becauſe the Church is litigious. Where there ſhall be a plenartie by inſtitution: and how Plenarty and avoydance ſhall be tryed.

WHen the Patron hath upon the Avoydance preſented his Clark within the ſixe moneths, which is the time limited by the Law; the Biſhop or Ordinary is to admit and inſtitute the Clarke into the Benefice: but before he be admitted, the Biſhop or Ordinary ought for to examine him of his ability; for if upon examination the Clarke preſented be found to be unable to ſerve the Cure, or criminous, as before is ſaid; then may the Ordinary refuſe for to admit or inſtitute him into the Benefice. This Examination is to be done at

at a convenient time within the ſixe moneths: for the Ordinary cannot refuſe for to examine the Clarke during all the ſixe moneths, and by reaſon thereof ſuffer lapſe to come to himſelfe; for if he ſhould ſo do, the Patron might loſe his preſentment, and the Ordinary ſhould take advantage of his owne wrong, in not examining of the Clarke within convenient time. But if the Ordinary, when the Clarke commeth for to be examined, *ſedet circa Curam Paſtoralem*; the Ordinary is not bounden to leave the buſineſſe in hand, and preſently examine the Clarke, but to make an end of his other buſineſſe firſt, and then to examine the Clarke; and the Ordinary may appoint a convenient time and place for the examining of him. 15.H.7.7.b. 15.El.inCom B.aud. acc.

If the Biſhop doe upon examination, finde the Clarke preſented to be of ability, and capable of the Benefice; then doth he admit him in theſe or the like words, *viz. Admitto te habilem, &c.* And afterwards hee doth inſtitute him into the Benefice, and giveth him his charge in theſe or the like words, *viz. Inſtituo te Rectorem Eccleſiæ Parochialis* C.4.part.79. 32.H.6.28.b. 33.H.6.24.

chialis de D. & habere curam animarum. Et accipe Curam tuam, & meam.

38.H.6.15.a. It is not materiall, whether the examination, admission or institution be made by the Bishop within his owne Dioceſe, or not; for that the Bishops jurisdiction to such, and the like purposes is not locall, but followeth the person of the Bishop: and therefore if a Clarke be presented unto the Bishop of Norwich to a Church which is void within his Dioceſe of Norwich, although the Bishop be in London or in any other place, out of his Dioceſe, yet may he there examine the Clarke and give admission unto him; for that the Bishops jurisdiction, as to the making of Clarkes, granting of administrations, and the like, is not locall, but followeth the person of the Bishop whereſoever he is.

P.21.Iac. in Com. R.Knollis & Dobins caſe, adjug.acc.

27.Eli.in Com B.Carter & Croſts caſe adjuge, acc.

Doct. & Stud. 116. If two joynt-tenants or two tenants in common, be of the Patronage, and they cannot agree in their presentment but varie, & present severall men to the Bishop, the Bishop is not bounden to admit any of their Clarkes; and if the sixe moneths incurre before they agree, the Bishop may collate his own Clarke

to

to the Church, but hee cannot collate within the ſixe moneths; for if he doe, they may agree, and bring a *quare impedit*, and remove the Incumbent, for that the collation was a diſturbance; But if there be two Coparceners, and the Church become void, and the eldeſt ſiſter preſent, the Biſhop is bounden for to admit her Clarke, for that by the Law the eldeſt ſiſter ſhall have the firſt preſentation, unleſſe there be agreement made betwixt them, for to preſent in ſome other manner.

34.H.6.40. 5.H.7.8. 11.H.4.58. 33.H.6.32. 20.E.3.Q.I. 69. F.N.B.37.

If two men preſent ſeverally to the Biſhop, the Biſhop cannot admit the Clarke generally to the Church; but the Biſhop in his admittance of the Incumbent, muſt admit him Incumbent of the preſentation of one of them; and if they preſent claiming by ſeverall titles or Patrons, the Biſhop is to direct his Writ *de jure Patronatus*, for that in that caſe the Church is become litigious; but the Biſhop is not to award the *jure Patronatus*, but at the requeſt and prayer of the parties. But it ſeemes by the booke of 5. *H.* 7. 22. by *Brian* and 34. *H.*6.38. The *jure Patronatus* muſt be ſued forth at the coſts of the Biſhop, becauſe

M.8.Jac. in Com.B. Danby & Linleys caſe. 7.H.4 Q.I. 100 Doct. & Stud. 17. 5.H.7.22. per Brian. 34.H.6.38.

becauſe it is for his excuſe, and ſo for his advantage. But if two coparceners be, and they ſeverally preſent unto the Ordinary; this doth not make the Church litigious, becauſe they claime by one title. And ſo it is, if they make compoſition, to preſent by turnes, and one of them uſurpe in the turne of the other, this uſurpation ſhall not put the other out of poſſeſſion.

Doct. & Stud. 117.

33.H.6.32.

22.E.4.4.

By Inſtitution made by the Biſhop, the Church is full of an Incumbent as to the ſpiritualties; that is to ſay, to celebrate divine Service, to adminiſter the Sacraments, to preach, and inſtruct the pariſhioners in the true faith: and in a *quare impedit* brought, Plenarty by inſtitution is a good plea againſt a common perſon, and yet the Incumbent thereby is not compleat Parſon, for that he wanteth the temporalties, by which he ſhould live, which he hath not before he be inducted; for upon the induction the temporalties, *viz.* the Glebe, Offerings and tithes are veſted and delivered unto him. And yet if a Clarke be admitted and inſtituted into a Benefice, with cure of ſoules, of the cleere yeerely value of eight pounds; and before

22.H.6.27.

38.E.3.4.

M.15.Iac. in Com. B. Morgan & Glovers caſe, adjug. acc

fore that he be inducted, he accept of another Benefice, with cure of ſoules, and be inducted into the ſame; the firſt Benefice is become void by the Statute of 21. *H.* 8. for in judgement of the Common Law, he that is inſtituted into a Benefice, hath accepted of the ſame; and the Church is full within the intent of the Statute before Induction; and yet the Incumbent is not ſo abſolutely Parſon by the inſtitution, that he can charge the Glebe thereby to binde his Succeſſour before induction. And therfore if a Prebendary, Parſon, or Vicar, after he be admitted and inſtituted, and before he be inducted, grant an Annuity out of his Prebend, Parſonage, or Vicarage, and the ſame be confirmed by the Patron and Ordinary, or by the Deane and Chapter; yet this ſhall not charge the Glebe or the Succeſſour of the Prebendary, Parſon, or Vicar; for although by the inſtitution he hath *jus ad rem*, yet he hath not *jus in re*; but the charge in that caſe ſhall lye upon the perſon, and not upon the Lands.

C. 4. part 77. in Digbyes caſe.

5. Eli. Dy. 221 Com. 528.

At the Common Law, if a ſtranger had preſented his Clarke to the Biſhop, and he had bin admitted and inſtitute into

into the Church, whereof a common perſon was the Patron; the Patron had no remedy for to recover his preſentment or Advowſon, but a Writ of right of Advowſon, by which the Incumbent was not to be removed: and ſo was it if an uſurpation had bin upon an Infant, or a *feme covert*, who had an Advowſon by deſcent, Plenarty generally was a good plea againſt them: and the reaſon was, firſt, that the Incumbent might quietly intend and apply himſelf to his ſpirituall charge: and ſecondly, for that the Law intended, that the Biſhop who had cure of ſoules within his Dioceſſe, would admit and inſtitute an able man, for the diſcharge of his dutie and his own; but at the Common Law, if one had uſurped upon the King, and his Clarke had bin admitted, inſtituted, and inducted, the King might have removed him by a *quare impedit*, and bin reſtored to his preſentation, by reaſon of his Prerogative, that *nullum tempus occurrit Regi*; but hee could not have preſented, neither could hee have removed the Incumbent by any way but by action. But this miſchiefe at the Common Law was remedied by the Statute

Statute of *Weſt* 2. *cap.* 5. which gave the *quare impedit* to the partie, notwithſtanding ſuch Plenarty, *dummodo Breve infra tempus ſemeſtre impetretur.* And at this day the Church is not full by inſtitution againſt the King; for as I ſaid before, at this day the King before induction, may repeale or revoke his former preſentation, which he could not doe if the Church were full of an Incumbent. If a Biſhop collate to a Church, and before the induction of the Clarke the Biſhop dye, and the temporalties of the Biſhop are ſeiſed into the Kings hands, the King ſhall preſent to the avoydance, becauſe the Church was not full againſt the King untill induction. 25.E.3 47.acc.

This Plenarty is a ſpirituall thing, and therefore if it come into queſtion, Whether the Church be full of an Incumbent, or not, the ſame ſhall be tryed by the certificate of the Biſhop, who beſt knowes of the inſtitution. But if the iſſue to be tried be, Whether the Church be void or not, the ſame ſhall be tried by a Iury of twelve men, at the Common Law, unleſſe the iſſue to be tried be upon ſome ſpeciall manner of avoy- 5.Eliz. Dyer 217. 21.Eliz. Dyer 317. 50.E.3.17.18. 22.E.3.10. 5.E.4.3.

avoydance, for then the same shall be tryed by the certificate of the Bishop, so as the especiall cause of avoydance be a spirituall cause.

Chap. XII.

Of Induction, by whom the same is to be done; how far the Parson or Vicar upon their Inductions may charge the Glebe. What actions they may maintaine for their possessions after Induction. And of the paiment of first fruits.

THE last thing for the making of the Clarke presented compleat Parson and Incumbent of the Church, is Induction. This is usually done by the Archdeacon, but may be done by the Bishop himselfe, which is nothing else but the putting of the Clarke into the possession of the Church and Glebe lands, which are the temporalties of the Church.

11.H.4.76.b. 14.H.6.Q.1. 162. 11.H.4.9.

If the Archdeacon will not Induct the

the Clark after ſuch time as the Biſhop hath admitted and inſtituted him, and directed his Letters to the Archdeacon to Induct him: by the opinion of *Fitz-harbert*, an action upon the Caſe will lye againſt the Archdeacon; becauſe that the Induction is a temporall act: but others are of opinion, and ſo hath it bin adjudged, That a Citation ſhall be awarded out of the Spirituall Court to the Archdeacon, to anſwer the ſame there, and he ſhall be puniſhed there, if there be cauſe; becauſe (ſay they) the Archdeacon may alledge ſome ſpeciall cauſe, for which by the ſpirituall Eccleſiaſticall Law the Clarke ought not to be Inducted; which cauſe may not be triable, or determinable in the temporall Court, *Ideo quære.*

F. N.B.74.h. 26.H.8.3.per Knightley. F.N.B.56.b. 38.H.6 15. P.23.Eliz. in Com.B.adjug. acc.

By Induction publique notice is given to the Pariſhioners, that he is their Parſon or Vicar, who hath cure of their Soules: and his Induction is alſo notified unto them, by his actions, *viz.* by his entring and taking poſſeſſion of the Church, ringing of his Bels, &c.

33.H.4.24.a.

After he is Inducted, he may by the Statute of 25.E.3.cap.7. plead any plea in barre in a *Quare Impedit* brought

4 H.8. Dye. 1.

againſt him as poſſeſſour of the Church.

8.H.5.9. As if a *Quare Impedit* be brought againſt him, he may plead a Releaſe in barre, becauſe he hath the Freehold in him, which ſhall not be loſt without his Anſwer. And after he is Inducted, he may have or maintaine any action reall, perſonall, or mixt, for the Glebe, or any thing concerning the poſſeſſion.

F.N.B.49. L. C.Litt.341. As if the Parſon make a Leaſe for life of his Glebe, he ſhall maintaine a Writ of *Conſimili caſu* during the life of the Leſſee; and a Writ of Entrie *ad terminum quem præteriit*, after the death of the Leſſee; ſo may he have an action of waſte for waſte done in the Glebe: but a Writ of Right, a Writ of Cuſtomes and Services, a Writ of *Ne injuſte vexes*, and other Writs which are grounded upon the meere Right he ſhal not have, becauſe the abſolute inheretance of the Glebe is not within: and ſo may he maintaine any action perſonall for and concerning the tithes or other profits of the Church detained and kept from him, in his owne name, which he could not have brought before he was Inducted.

36 H.8.Dyer in Taverners caſe. If a Parſon, or Vicar, who is Inducted

cted and compleat, doe after Induction make a Leaſe of his Glebe lands and tithes for yeeres (by Deed) as the ſame must ſo be, the Leaſe is good; yet in that caſe, the Parſon or Vicar himſelfe muſt ſerve the Cure, and not the Leſſee: for that the Cure being a ſpirituall charge and miniſtration, doth not follow the Glebe or tithes, but is inſeperably annexed to the perſon of him who is the Incumbent of the Church

19.H.6. & 21.H.7.2cc.

C.Litt 96. pl. 136.

After that the Clarke is Inducted by the Archdeacon, or otherwiſe, he muſt compound for the firſt fruits with the King, before he take any profits of the Benefice; for if he take any profits before he hath made any compoſition for the firſt fruits, he ſhall pay double fruits; and for the paiment of the firſt fruits, he muſt be bound in an Obligation with Sureties; and upon the paiment thereof he ſhall have of the Receiver of the King of the firſt fruits a Bill, teſtifying the receit thereof, and his bond delivered up to him againe. *Y Stat. 26. H. 8.*

Chap. XIII.

By what Acts the Church may become void, and the Incumbent removed out of his Benefice. And of avoydance by death, and entrie into Religion.

THus have I ſetled the Clarke preſented a perfect Incumbent in his ſpirituall Benefice, with cure of ſoules, and in the poſſeſſion of the Church, and have given him ſome power therein: Now let us ſee by what and by whoſe Acts the Church may become void, and the Clarke preſented, removed and put out of his Benefice againe.

The Church may become void by ſeverall meanes and Lawes, either by the Eccleſiaſticall and Spirituall Law, or elſe by poſitive and Statute Law; and in ſome caſes the Church ſhall become void by the meere act of the Law, in ſome caſes by the act of the party Incumbent; and in ſome caſes by ſentence given and pronoun-

nounced in the Spirituall Court grounded upon the Act, or the defect of the partie.

In all caſes, the death of the Incumbent is a preſent avoydance of the Church; and therefore if the Incumbent dye, the Church is preſently void, and the Patron ought at his perill to take notice of the avoydance, and preſent another Clarke unto the Ordinary, to be inſtituted into the Benefice within ſix moneths, without any notice to be given unto him of the Incumbents death, otherwiſe lapſe ſhall run to the Ordinary, as before is ſaid.

There is a naturall death, a death *de facto*, and there is a civill death, a death in Law: as the naturall death maketh a preſent avoydance of the Church *de facto*, ſo the civill death doth make the Church to become void *de jure*, though not *de facto*. If a man had entred into Religion, and bin profeſſed (*renunciavit omnibus quæ ſæculi ſunt*) and he was civilly dead, dead in Law, ſo as his profeſſion were in ſome houſe of Religion within the Realme; for of forreigne profeſſions or Profeſſours, the Lawes and C.Litt.132.a. C.Litt.132.b.

Iudges of the Kingdome were not to take knowledge. And by ſuch profeſſion in Religion, the Church had become void, whereof he was before incumbent; yet might the King being *perſona mixta*, and having both iuriſdictions, as well the Eccleſiaſticall as the Temporall united in his royall perſon, have diſpenſed with ſuch a Parſon or Vicar, that he might have holden all the Benefices that he had, notwithſtanding his former profeſſion in religion; and the Patron had no remedy for ſuch an avoydance: for that by the profeſſion the Church was not void *de facto*, but *de jure* onely. But in that caſe, if the profeſſion had bin certified by the Ordinary, and no licence or diſpenſation had bin obtained from the King, then had this civill death by the Eccleſiaſticall Law bin an avoydance of the Church, of which the Patron might have taken advantage, and might have preſented another man to have bin inſtituted and inducted into the Benefice. By the Eccleſiaſticall and Spirituall Law, the Church may become void divers wayes: firſt, by Ceſſion: ſecondly by Deprivation: thirdly, by Reſignation:

11.H.4.37. & 213.

on: fourthly, by Creation. Of all which in ſeverall Chapters following very briefly.

Chap. XIV.

Of avoydance by Ceſsion. What Ceſsion is; and whereupon Ceſsion, the Church is void without notice, where not.

BY a Canon made in the Councell of Lateran, holden under Pope *Innocent* the third, *Anno Dom.* 1215. it is ordained, *Quod quicunque reciperit aliquod Beneficium cum cura animarum, ſi prius tale beneficium obtinebit, ſit eo jure ipſo privatus, Et ſi fortè illud retinere contenderit, alio ſit ſpoliatus; Is quoque ad quem prioris ſpectat Donatio, illud poſt receptionem alterius conferat cui meritò viderit conferendum.* This Decree or Canon is generall; and if a Parſon or Vicar that had had one Benefice, with cure of ſoules, had taken a ſecond Benefice, without Diſpenſation or Licence, the ſame had bin an avoydance

24.E.3.30. of the firſt Benefice, called a Ceſſion of the firſt Benefice, by the ſaid Canon, F.N.B.34.L. without any ſentence declaratory to have made the Church void; yet by ſuch Ceſſion the Church was not ſo abſolutely void *de facto*, that the Lapſe ſhould have encurred upon the Patron, if he had not preſented another Clarke within ſix moneths, unleſſe notice had C.4 part.77.b in Hollands caſe. bin given unto the Patron by the Ordinary of the ſaid Ceſſion. So if the Incumbent of a Parſonage or Vicarage, with cure, had bin made Deane of a 5.E.3.9. Cathedrall, his firſt Parſonage or Vica- 24.E.3.33. rage had bin void by Ceſſion, by the Eccleſiaſticall Law, and by the ſaid Canon; becauſe that the dignity and the Benefice were not compatible: and the Statute of 21.H.8. cap.13. is but in affirmance of the Eccleſiaſticall Law, and to the ſaid Canon, as to that point. But the King might have diſpenſed with the ſaid Canon, and might have enabled any Parſon or Vicar to have holden two Benefices, with cure of ſoules, notwithſtanding the ſaid Canon made in the Court of Rome. For notwithſtanding divers Eccleſiaſticall Lawes and Canons were firſt made in the Court of Rome,

Rome, and were afterwards confirmed within this Realme by acceptance and uſage, and ſo became the Eccleſiaſticall Lawes of this Realme; and therefore although the ſaid Canon which maketh the taking of a ſecond Benefice to be a Ceſſion of the firſt, was made and deviſed firſt in the Court of Rome; and alſo notwithſtanding that the King might have diſpenſed with the ſaid Canon, and ſo did to many perſons many times, yet was it adjudged 29. E. 3. 44. in the Prior of *Oxgates* caſe, that by force of that Canon, and ſo by the Eccleſiaſticall Lawes of the Realme, by the taking of a ſecond Benefice, the firſt Benefice became void by Ceſſion.

If one preſent himſelfe to a Church, who hath a former Benefice with cure of ſoules; this is a Ceſſion of the firſt by the Eccleſiaſtical Laws of this Realme. But the Courts and Iudges of the Common Law are not to take notice of ſuch Ceſſion, untill the ſame be certified unto them by the Ordinary from the Eccleſiaſticall Court. 14. H. 8. 17.

CHAP.

Chap. XV.

Of avoydance by Deprivation, What are cauſes of Deprivation, in the ſpirituall Court, approved by the Canon Law: and whereupon ſuch avoydance notice muſt be given to the Patron by the Ordinary, where not.

THE ſecond meanes of avoydance of the Church or Benefice with Cure, is Deprivation; which although it be the act of the Law in the ſpirituall Court, yet is it grounded upon ſome Act or deſert of the party incumbent; and is the diſcharge of the Incumbent of his incumbency, by a ſentence declaratory in the ſpirituall Court, upon a ſufficient cauſe proved in the ſame Court againſt him.

Cauſes of Deprivation in the ſpirituall Court (all which are approved and allowed of by the Common Law,) are *Conſcientia criminis, debilitas corporis, defectus Scientiæ, malitia plebis, grave ſcandalum, irregularitas perſonæ*, Hereſie,

ſie, Schiſme, Baſtardy, and many more.

1.5.R.2.A Cardinall was collated by the Biſhop of Durham unto a Benefice, the Biſhop dyed, and the temporalties of the Biſhop being in the Kings hands, the King brought a *Quare impedit*, and ſhewed that the Cardinall was Miſcreant, and was deprived for Miſcreancy in the Court of Rome; and it was adjudged a ſufficient cauſe of Deprivation; and there *Belknap* ſwore the Law to be; That if a man for adhering unto the Kings enemies, ſhall forfeit his Lands by his adherence, & the King ſhal have the Eſcheate, becauſe he is out of the faith of his liege Lord the King, *a fortiori*, he ſhall forfeit his living who is out of the faith of his God. And it was there agreed, That although the Cardinall were deprived in the Court of Rome, yet whether he were Miſcreant or not, ſhould be tryed where the Church was in England, by the certificate of the Biſhop of the Dioceſſe there. 5.R.2 tryal 54

If a Clarke preſented be perjured, and be thereof attainted in the ſpirituall Court, upon proceſſe of their Law, 38.E.3 2 & 3

or

or upon his owne confeſſion; the ſame is a good cauſe for to deprive him of his benefice. But the Patron of this Deprivation muſt have notice of the Ordinary: and ſo it is, if the Clarke preſented be irreligious, illiterate, baſtard, villeyne, or a meere lay man, not within Orders.

5.E.4.3.
5.H.7.19.

19.El.Dy.353 Blowers caſe.

If the Patron preſent a meere lay man, within the age of three and twenty yeeres, who is admitted, inſtituted, and inducted; and then is ſued in the ſpirituall Court for to be deprived for his incapability, by a ſtranger; and afterwards a *Quare impedit* be brought againſt the Ordinary and the Incumbent; and judgement be given againſt the defendant, for default of not appearing at the grand diſtreſſe: if afterwards the ſame Incumbent be (by ſentence pronounced againſt him in the ſpirituall Court) deprived for his incapacity at the ſtrangers ſuit; the deprivation is good, although he were removed before upon the judgement given in the *Quare impedit*. But if the Incumbent, who is deprived, doe afterwards bring a Writ of Deceit upon the Iudgement given againſt him in the *Quare Impedit* by

27.H.6.5.

by default for that he was not ſummoned; he ſhall have judgement thereupon, and the Deprivation in the Spirituall Court ſhall be no impediment unto him, in that judgement: for that in the *Quare Impedit* the Incumbency was not in queſtion, but the diſturbance onely; and he ſhall be reſtored to what he loſt.

If the Patron preſent a meere lay Man, the ſame is a good cauſe of deprivation of him; but if ſuch a lay man be Inſtituted and Inducted, he is Incumbent *de facto*, and ought to be deprived by ſentence: and of ſuch Deprivation the Ordinary muſt give notice to the Patron: but if the Patron doe preſent a meere lay man, and the Ordinary doe refuſe him; there, the Ordinary needeth not to give notice therof unto the Patron, for that it is notorious that he is incapable. 13.El.Dy.293

In ancient times, if a man had bin a Dilapidatour of his Church, hee might have bin deprived for the ſame cauſe: as if a Biſhop, Prebendary, or Parſon had committed waſte in deſtroying or cutting downe of all the timber trees or woods that were ſtanding, or growing 29.E.3.16. 20.H.6 46. 2.H.4.3 per Tirwhitt. C.11.part.72. C.11.part.40 in Lifords

ing upon the Lands, or pulled downe the houſes belonging unto, or parcell of the poſſeſſions of the Biſhopricke, Prebend, or Parſonage, he might have bin depoſed or deprived. And ſo it was if a Parſon, Vicar, or other Eccleſiaſticall perſon, ſeiſed in the right of the Church, had alienedd the Lands of the Church, hee might have bin depoſed. But the ſame doth not hold for Law at this day.

9.E.4.34.2.

20.H.6.46. per Aſcough.

4.Ma.Dy.133 7.H.4.16. 8.E.3.55. acc.

In the time of Queene *Mary*, for a Prieſt to have bin married, had bin a ſufficient cauſe for to have deprived him of his Benefice, but ſo is it not now.

C.4.part 102. Winſors caſe.

An Incumbent was admitted, inſtituted, and inducted into a Benefice, with cure of ſoules, in the time of King *Edward* the ſixt; and afterwards in the time of Queene *Mary* he was deprived, becauſe he was a married man, and a favourer of the religion in the time of King *Edward* the ſixt. And the Church being void by his deprivation, another man was inſtituted and inducted in the time of Queene *Mary* into the Benefice: and afterwards in the time of Queen *Elizabeth*, the laſt Clark was

was deprived, and the firſt ſentence of deprivation in the time of Queene *Mary*, adjudged and declared to be void, and the firſt Incumbent reſtored to his Benefice. It was adjudged in that caſe that deprivation of the firſt Incumbent was good, and ſtood good untill the ſame was afterwards declared to be void; and untill then the ſecond Clark was lawfull Incumbent: but when the ſentence of Repeale came, and made void the firſt Deprivation; then was the firſt Incumbent in againe by force of his firſt Preſentation, Inſtitution and Induction, and needed not any new Inſtitution or Induction into the ſame.

There are many other cauſes of Deprivation, which at this day are allowed and approved by the Common Laws of this Realme: As diſobedience unto the Ordinary, incontinency, drunkenneſſe, &c. Or if a Parſon or Vicar had remained Excommunicate by the ſpace of forty dayes, and had not bin received into the Church, the ſame had bin a ſufficient cauſe for to have deprived him of his Benefice which he then had. But in theſe and the like caſes, the Church is not void *ae facte*, without a ſentence

ſentence given in the Spirituall Court, and the King may pardon the offence at this day, and then he ſhall not be deprived or ouſted of his Benefice. But it is to be noted, that in all caſes of deprivation in the Spirituall Court, there muſt be a ſentence in force againſt the party: for if ſentence ſhould be given in the Spirituall Court againſt an Incumbent, for any of the cauſes before ſaid, and he appeale to a ſuperiour Court, (pendant the appeale) the firſt ſentence is in ſuſpence, and the Church ſhall not be void untill the ſentence after the appeale be affirmed: and if the ſentence be diſanulled and repealed, then is the party ſtill Incumbent by force of his firſt preſentation, and needeth no new Inſtitution or Induction into the Benefice.

Thus much of avoydance of the Church by Deprivation of the Incumbent by ſentence Eccleſiaſticall approved and allowed for fit and ſufficient cauſes of deprivation by the Common Law.

CHAP.

Chap. XVI.

Of avoydance by Acts of Parliament, and where upon ſuch avoydance notice is required, where not; and what manner of notice is ſufficient, what not.

THere is an avoydance of the Church alſo by Statute Law, in which caſes there needeth not any ſentence to be given of Deprivation of the incumbent, in the ſpirituall Court.

The Statute of 21. H. 8. cap. 13. is, that if any perſon having one Benefice with cure of ſoules, of the yeerely value of eight pounds, accept and take another Benefice, with cure, and be inſtituted and inducted into the ſame, immediately after poſſeſſion had thereof; his firſt Benefice ſhall be adjudged in Law to be void; and the Patron ſhall preſent in ſuch manner and forme as though the Incumbent had dyed. By this Statute, if the Incumbent had taken a ſecond Benefice without diſpenſation, the firſt Benefice had bin void without 9. Eli. Dy. 255 7. Eli. Dy. 237

C.4.part.79. any declaratory ſentence of deprivation of the Incumbent in the Spirituall Court; and of the deprivation the Patron was to take notice at his perill: but if a man that hath one Benefice, with cure of ſoules, of the value of eight pounds, and ſhall take another Bene-
23.El.Dy.377 fice without diſpenſation, and doth not read the Articles, and afterwards dyeth, the admiſſion, inſtitution, and induction of him into the ſecond Benefice are meerely void; and the firſt Benefice is void by his death, and not by the Statute of 21. H.8. for that he was never lawfull Incumbent of the ſecond Benefice.

The words of the Statute of 21.H.8. cap.13. are (ſhall take another Benefice, with cure of ſoules, of the cleere yeerely value of eight pounds.) In the eight yeere of the reign of King *Iames*, there was a queſtion in the Court of Common Plees, What value the Parliament of 21.H.8. intended; whether the very value of the Benefice, or the taxed value, *viz.* as the ſame was valued at in the Booke of firſt fruits: The caſe was thus, The Kings Majeſty brought a *quare impedit* againſt the Biſhop of Briſtow

stow and *Hanleigh* the Incumbent, for disturbing of him to present unto the Church of *Smyre*, in the County of Dorset, which came unto him by Lapse, and set forth the Statute of 31. H.8. and shewed that *Hanleigh* the defendant was Parson of *Smyre*, and that *Smyre* was a Benefice, with cure of soules, of the value of eight pounds, *viz.* of the value of thirty pounds *per annum*. And set forth, that the defendant *Hanleigh* had taken another Benefice with cure, *viz.* of *Milbury Buck*, in the said County of Dorset, by reason whereof the first Benefice was void, and continued void two yeeres, and so the King ought to present for Lapse, and the defendants did disturbe him. The Bishop pleaded, that hee claimed nothing in the Advowson, but the Admission and Institution as Ordinary, and *Hanleigh* the Incumbent pleaded a speciall barre, *viz.* by protestation, that the Church of *Smyre* at the time of the making of the Statute of 21. H.8. was but of the value of seven pounds thirteene shillings foure pence, *& non ultra*, and pleaded the Statute of 26. H.8. by which Statute the Lord Chauncellour had Com-

P. 8. Iac. in Com. 8. Roy & Leneſye de Brihgwes caſe.

miſſion to enquire of the value of all Benefices, and to certifie the ſame into the Exchequer; and that a Commiſſion was awarded unto divers Knights and Gentlemen in the Country, who upon Inquiſition found and returned, the Church of *Swyre* to be of the value of ſeven pounds thirteene ſhillings foure pence, which was certified by them into the Exchequer; and that he was Inſtituted and Inducted into the Church of *Swyre*, and becauſe the ſame was but of ſmall value, the Archbiſhop of Canterbury afterwards, *quantum in ſe eſt*, did grant unto him Diſpenſation to take another Benefice, which Diſpenſation was confirmed by the Kings Letters Patents: and that afterwards he was preſented, admitted, Inſtituted and Inducted into the Church of *Milbury Buck*, being a Benefice with cure of ſoules, of the yeerely value of eight pounds. And upon the plea of the defendant *Hauleigh*, Sir *Henry Hobart* Knight, the Kings Atturney generall, did demurre in Law; and this caſe was argued by all the Serjants at the Barre, and *Paſc. 8. Iac.* by the Iuſtices, *vid.* by *Foſter*, *Warburton*, *Walmeſley* and *Coke*

Coke chiefe Iuſtice; and the Court was divided in opinions, for *Foſter* & *Walmeſley* Iuſtices, held, that the value ſhould be taken according to the taxed value, and as the ſame was in the Booke of firſt fruits; but *Warburton* and *Coke* chiefe Iuſtice, were of opinion, that the value ſhould be taken for the very value of the Benefice: and the caſe was adjourned for variance in opinion, and for difficulty into the Exchequer Chamber; and (as I have heard) the ſame was afterwards compounded by a ſpeciall Order from the Kings Majeſty: and in maintenance of the opinions of *Warburton* and *Coke*, ſome preſidents were produced and ſhewed in the Court of Common Plees. One preſident was in 40. *Eliz.* in the Common Plees betwixt *Buſh* and *Smith*, where iſſue being taken upon the value of the Benefice, the Iury found according to the very value, and not according to the taxed value. One other Preſident was 41. *Eliz.* betweene *Bond* and *Tricket* for the Parſonage of *Marſton*, where *Anderſon* chiefe Iuſtice at the Aſſiſes, directed the Iury, the iſſue being then upon the value of the Bene-

4. Eli. in Com. B. Buſh & Smiths caſe.
24. E. 3. 35. per Stone.
3. E. 2. recovery in value.
1. per Birns.
7. El. Dy. 237.
41. Eli. at Aſſiſes. Bond & Trickets caſe.

fice to finde according to the very value, and not according to the taxed value. And the question rested, and was not sturred againe untill *Pasc.* 10. *Caroli Regis*; at what time the same was moved againe in the Court of Common Pleas, and was then argued by *Brampston* and *Darcey*, Serjeants: and the Court then seemed to incline against the opinions of *Coke* and *Warburton* before delivered in *Hawleighs* case: but the case was not then resolved, nor is yet resolved or adjudged that I know.

The Statute of 13. *Eliz. cap.* 12. ordaineth, that he that doth not subscribe unto the Articles, nor readeth the Articles of Religion, shall be deprived *ipso facto*, and all his Ecclesiasticall promotions shall be void, as if hee were naturally dead. Vpon such an avoydance there needeth not any Sentence declaratory of Deprivation of the Incumbent, for there the Church is presently void, and where avoidance is by Act of Parliament, there needeth not any sentence of Deprivation; for if such a Parson or Vicar shal libell against his Parishioners for tithes, they may plead

plead against him the not reading of the Articles, without any mention at all, that he was deprived for the same cause. But if an Incumbent be deprived for not reading of the Articles, the Ordinary must give notice thereof unto the Patron, and the notice must be certaine and particular, that the party hath not read the Articles, and generall notice that he is incapable of the Benefice is not sufficient; neither is intimation thereof given at the Church doore or in the Pulpit sufficient, but notice therof must be given unto the person of the Patron, and it must be given by the Ordinary; for if the Patron himselfe will of himselfe take knowledge of the Clarkes not reading of the Articles, and suffer two yeeres to passe, yet Lapse shall not runne upon the Patron, unlesse he hath had speciall notice thereof, and hath surceased to present another Clarke unto the Church. But if the Clarke be refused by the Ordinary for inability, illiterature, or for any of the causes before mentioned, whereof notice ought to be given to the Patron: if the Patron doe dwell in a farre or remote Countrey, so as he cannot easily be

18. El. Dy. 348

22. El. Dy. 369

16. El. Dy. 327

be found out by the Ordinary; in ſuch caſe, if the Ordinary make the inability of the Clarke, or other cauſe of his refuſall knowne by intimation fixed upon the Church doore, it ſeemeth that in that caſe the ſame is ſufficient.

By the Law, the preſentation unto every Benefice, after the ſame is once void, ought to be *Libera, pura, vera, ſi pecunia inter venerit, non eſt aut preſentatio, aut donatio, ſed venditio.* If therefore there ſhall be any contract, covenant, promiſe or agreement made with the Patron or with any other, that the Patron for any ſumme of money, gift, reward, benefit, or other conſideration or thing whatſoever, valuable, ſhall preſent I.S. to the Benefice being void, albeit the ſame be made without the conſent or knowledge of I.S. and afterwards upon ſuch contract or conſideration, the Patron doth preſent I.S. to the Benefice, and he bee admitted, inſtituted, and inducted by the Statute of 31. *Eliz. cap.* 6. the preſentation, admiſſion, inſtitution, and induction of him are abſolutely void, which were before,

C. Litt. 120. M. 41. Eli. in Com. B. Baker & Rogers caſe.

fore, but voidable by deprivation, and the King shall have the turne.

Parkinson Patron of the Advowson of the Church of Dale, the Church being then void, did contract with a stranger, that for ten pounds *per annum* to be paid unto *Parkinson*, during the life of *Kitchin*, that he would present *Kitchin* to the Church, which was then void: and it was adjudged, that although that *Kitchin* knew not of the said contract, nor was any wayes agreeing or consenting unto the same, yet he came in by Symony; for the Statute of 31. *Eliz.* shall be expounded largely against Symony, and Symonists. And the very presentation, institution, and the induction of *Kitchin*, in that case, were adjudged void. M. 8. Iac. in Secret. Calvert & Kitchins case, adjuge.

If a man purchase the next Presentation or Avoydance, and doth not mention in certaine, what person he intendeth for to present, when the Church become void, he may present any person whatsoever, who is capable of the Benefice; but if a man purchase the next avoydance or presentation, or the next presentation or

avoydance

avoydance be granted unto him, to preſent I.S. by name, be he the Sonne, or kinſman of the Patron, or a ſtranger: It was adjudged *Paſc.* 14. *Iacobi in Com. B. Kett.* 1026. in *Pilſton* and *Benedict Winſcombs* caſe, that the ſame is ſymony, and the Clarke preſented comes in by ſymony, and the Patron ſhall loſe his turne, and the King ſhall preſent.

39. Eli. Bucks caſe.

If the elder brother give money to the Patron to preſent his yonger brother, being then Scholler in the Vniverſity, the Church being void; or if the Teſtatour contract by ſymony, that his Executour ſhall preſent another man to the Church, the ſame being void at the time of the contract; and the Teſtatour dyeth, and the Executour doth preſent accordingly, although the yonger brother, or the other knew not of the ſaid contracts, yet this is ſymony. And ſo odious a thing is ſymony in the eye of the Law, That if (the Church being void) a man ſeeks for money or other corrupt conſideration, to be preſented unto the ſame, although that afterwards the Patron doth preſent the ſame man *gratis*, yet the per-

3. Iac. in Com. B. Freeman & Engliſhes caſe

The opinion of Tanfield chiefe Baron, in Calvert and Kitchins caſe, &c.

ſon

ſon preſented, for this his ſymoniacall attempt onely, is ſo diſabled to take the ſame Benefice for ever after, that the King himſelf, to whom the Law giveth tythe to preſent in ſuch caſe cannot preſent the ſame man againe, unto the ſame Church: for that the Statute being made for the ſuppreſſion of ſymony, ſymoniſts and corrupt agreements, doth ſo binde the King in thoſe caſes, that the King cannot inable him who is diſabled by the Statute; and the party being diſabled by Act of Parliament, the ſame being an abſolute Law, cannot be diſpenſed withall by any grant of the King with a *Non obſtante* the Statute, as a Law may be whereby a thing is prohibited *ſub modo*, onely upon a penalty given to the King. And if the King by a ſpeciall pardon doe pardon the ſymony, yet that doth not make the perſon capable of the Benefice, who was diſabled by the Statute, nor can he plead the ſame pardon againſt the Statute of 31. *Eliz.* as it was reſolved *M.* 10. *Iac.* in the Common Pleas, in *Samford* and Doctor *Hutchinſons* caſe.

If

3. Inc. in Com. B. Goodwins case.

If the Church be void for Symony by the Statute of 31. *Eliz.* the Ordinary is not bounden to give notice of the Avoydance within six moneths after the presentment made; for that for the most part, contracts by symony are made so secret, that the Ordinary cannot have notice of them, and the Church is void by the Act of Parliament; and therefore no notice is requisite. But if a Clarke presented be deprived in the Spirituall Court for symony, there, of such Deprivation notice ought to be given by the expresse words of the Statute of 31. *Eliz.*

CHAP.

CAP. 17.

Of Avoydance by Reſignation. What Reſignation is, and to whom to be made, and when and where all charges of the Incumbent ſhall be avoyded upon reſignation, where not.

THE third meanes how the Church may become voyd is by reſignation which is the act of the party. Reſignation is the voluntary yeelding up of the Incumbent of his benefice, to make the Church voyd of his incumbency. If it be of a benefice with cure of ſoules, the reſignation muſt be made unto the biſhop who is the immediate ordinary by by whoſe admittance and inſtitution he came firſt into the Church, and cannot be made unto the King who is ſupreame Ordinary in all the Dioceſſe in England. And the reaſon thereof is, for that upon the reſignation, the Ordinary is to give notice unto the Patron of the avoydance; to the intent that the Patron may 18.H.8.49.in Kelloway.

preſent another to the Church, which the biſhop may doe, but the King is not bounden for to doe.

10. *H.* 6. 11. If two Parſons or Vicars do agree to permute their benefices, this cannot be done by any act of theirs, but there muſt be a reſignation of their benefices firſt made unto the Ordinary, for they muſt be inducted and ſetled therein under him. But if a reſignation be made of any dignity, or other promotion ſpirituall in the Church, and not of a benefice with cure of ſoules, there to extinguiſh the dignity or ſpirituall promotion, the reſignation made unto the King as ſupreame Ordinary is ſufficient, ſo it be made by fit and apt words.

13. *Eliz.* *Dy.* 294. *Goodman*, prebendary of the Prebend of Cory, in the Cathedrall Church of Wells, by deed inrolled did grant, render, and confirme unto King *Edward* the 6. *totam prebendam ſuam de Cory, & omnia maneria, poſſeſſiones, jura, & hereditamenta quæcunque tam ſpiritualia, quam temporalia. Et plenam & liberam diſpoſitionem, authoritatem & poteſtatem dictæ prebendæ ſpectantem ſive incumbentem.*

Habendum

Habendum eidem Regi & ſucceſſoribus ſuis, ad eorum proprium uſum ad omnem juris effectum, &c. And after the *habendum* there, were theſe words in the deed, *Ne cui in hac parte ad omne juris effectum qui exinde ſequi poterit aut poteſt dicta Prebenda, & omnia jura mihi ratione ejuſdem qualiter cunque acquiſita, ut decet, ſubjicio & ſubmitto:* and it was agreed by the Judges, 1. That thoſe words were effectuall, and ſufficient for to make a reſignation of the Prebend. 2. That the reſignation of the dignity made unto the King as ſupreame Ordinary was good for to extinguiſh the dignity although the ſame was not made unto the immediate Ordinary. 3. That by that deed and by thoſe words *Canoniam ſive Canonicatum* his ſpirituall Function was ſurrendered unto the King. For by the Law *Reges ſacro oleo uncti ſpiritualis juriſdictionis fuerunt capaces.* And againe, *Rex eſt perſona mixta cum ſacerdote.* And by the Canon and Common law, are capable of Tythes, Proxies and other ſpirituall things of which lay men were not capable.

The words of ſubſtance in the inſtrument of reſignation made unto the Ordinary, muſt be either *renunciare*, *cedere*, or *remittere*, in the caſe of a common parſon; for the word *reſignare* is no fit or proper word of reſignation of the Church as it was taken by the Civilians in *Goodmans* caſe. But in caſe of the dignity reſigned unto the King the words in the ſaid grant were holden to be ſufficient to make a reſignation of the ſame.

The time of the reſignation is ſecondly conſiderable, and therefore if a man preſented unto a benefice wth cure of ſoules be admitted and inſtituted by the Biſhop, the Church in caſe of a common parſon is ſaid to be full, and he may then reſigne. But where the King is Patron, there, becauſe the Church is not full untill induction, he cannot reſigne before he be inducted; but in no caſe, before he be inducted can he charge the Glebe: and if he be inducted and do charge the ſame, yet ſuch charge upon his reſignation ſhall be avoyded, and ſhall bind but during his time.

time; as if a Prebendary or Parſon make a leaſe for yeeres, and afterwards reſigne the leaſe for yeeres ſhall be avoyded: and ſo if a Parſon or Vicar alien the Glebe of his Church, or permute the ſame, the ſucceſſor may enter; but if a Writ of annuity be brought againſt a Parſon who prayes in ayd of the Patron and Ordinary, and the ayd is granted, and they make default, and after their default, the Parſon doth confeſſe the Action, and then doth reſigne, or dieth, this by the Common Law ſhould have bounden the Patron Ordinary and the incumbent, becauſe the Parſon had done as much as lay in him to have freed and diſcharged the Glebe by praying in ayd of the Patron and Ordinary.

12.H.8.8. 26.H.8.2. 21.H.7.1.b. 2.H.4.5. Litt.ſect.643. 12.H.8.9. 20.H.6.46.6. 7.H.6.38. 4.H.7.2. 19.H.6.39.

If a Writ of Annuity or other Writ be brought againſt a Parſon or Vicar, and pendant the Writ the Parſon or Vicar doe reſigne his parſonage or vicarage into the hands of the Ordinary, becauſe the reſignation is the act of the party, he ſhall not take advantage thereof and abate the Writ brought againſt him; but if a Writ

10.H.6.10.

be brought by an incumbent, and pendent the Writ he reſigne, he ſhall thereby abate his owne writ.

1. *H.*6,2. The Abbot of Mornabye brought a Writ of Detinue againſt *I. S.* proces continued untill *I. S.* was outlawed, and afterwards he purchaſed pardon of the outlawry, and had a *ſcieri facias* againſt the Abbot, and the Writ being delivered unto the Sheriffe, he made his returne, That he could not warne the Abbot becauſe that before the Writ was delivered unto him the Abbat was depoſed; and this was adjudged a good returne, for the depoſing of the Abbot was by the act of the Law, and it was before the Writ was delivered unto him, and after that the Abbot was depoſed he was but a Monke, and ſo could not be warned without his ſoveraigne, and the ſoveraigne could not be warned becauſe he was not party to the firſt Writ. But if a Writ be brought againſt a Parſon or Vicar for ſome act of their owne, as for incontinency, drunkennеſſe, &c. Or if the Abbot in ſuch caſe be depoſed there the Writ ſhall not abate,

2 *Ma. Dyer* 105.

10. *H.*6. 11.

but

but the ſucceſſor in eaſe of the Abbot if he die, upon cauſe ſhewed in Court ſhall abate the firſt Writ.

If an incumbent take forth proces againſt *I. S.* for any thing concerning his rectory, and afterwards permute his benefice with another, and before the returne of the writ the the Exchange be avoyded, he is in againe of his old eſtate, and his firſt writ ſhall not abate. And ſo it is if after his action brought, he reſigne his benefice, and before the returne of the writ, he be promoted againe unto the ſame benefice, this ſhall make his firſt action good.

CAP. 18.

Of avoydance by Creation, whether notice be requiſite thereof. From what time the 6. monethes ſhall be accounted. And where Writs ſhall abate upon creation, where not.

THe fourth and laſt meanes of avoydance of the Church is by creating of the incumbent biſhop.

29 H. 8. *br.* 116. 7. E. 4. 40. 21. E. 3. 40. 41. E. 3. 6. 11. H. 4. 37. *per Hill.* 46. E. 3. 32. 22. H. 6. 27. 4. *Ma. br.* 494. 11. H. 4. 38. 5. *Ma. br.* 498. 41. E. 3. 6. 11. H. 4. 213.

For ſo ſoon as ever he is conſecrated (but not before) without any declaratory ſentence in the ſpirituall Court: All his former benefices are *ipſo facto* voyd, and the King (or other Patrons ſhall preſent unto them; and if they be diſheted they ſhall have a writ *Quare impedit preſentare ad Eccleſiam.* And the reaſon why the former benefices are *ipſo facto* void, is not onely for the inconveniency of plurality, but alſo for that it would be very inconvenient that one and the ſame man ſhould be both ſoveraigne and ſubject. But till conſecration his former benefices are not voyd, for although he be elected and confirmed biſhop, yet before he be conſecrated, the King may diſpenſe with him to hold all or any of his former dignitie or benefices in *Comendam*, and that the King hath done and many times doth eſpecially where the biſhopricke unto which he is promoted is but of ſmall revenue and not ſufficient to maintaine the charge, ſtate, and honour of a biſhop.

Of the conſecration of the incum-

bent

bent Biſhop, the Patron is to take notice at his perill. And the ſix moneths ſhall bee accounted from the time of the Conſecration as before is ſaid. Dr. & Stud. 128.

Conſecration of the incumbent Biſhop is the Act of the Law and of the King, and not of the party incumbent: and therefore, if the incumbent bring an action concerning his owne Freehold, poſſeſſion, or perſon, and afterwards pendant the Writ he be created Biſhop, the Writ ſhall not abate, as the Writ ſhall doe, brought by an Incumbent for any thing concerning his Rectory, upon the Reſignation of his Benefice which is the meere Act of the Incumbent himſelfe. 44 E 3. 9. 14 Hen. 8. 16. C. Litt. 132.

What are the Incidents unto the Creation of a Biſhop; How the ſame is done, by whom, and by whoſe Authority: and what acts or things a Biſhop may doe after he is elected and before hee bee conſecrated: and how, and by what meanes his Temporalties are delivered unto him, I have declared. This onely take for a con-

a concluſion concerning this matter, of Creation of a Biſhop, *viz.* That as to the perfecting of, and bringing in of an incumbent into the Church, there are foure things required, that is to ſay, Preſentation, Admiſſion, Inſtiſtution and Induction: So unto the promoting of an Incumbent to the Dignity of a Biſhop, foure things are neceſſary, *viz.* Election, which hath the reſemblance of a Preſentation: Confirmation, which hath the the reſemblance of Admiſſion: Conſecration, which hath the reſemblance of Inſtitution: and Inſtallation or Inthronization, which hath the reſemblance of Induction.

CHAP. XIX.

Of Plurality, How an Incumbent is capable thereof, and by whose meanes he is made capable. How by the Canon Law, No man was capable of Plurality, and how the King might dispence with the Canon; where, and in what cases, and by whom, Faculties, Commendams, and Pluralities were granted before the Statutes of 2 & 25 Hen. 8. & 1 Eliz. Of Commendams retinere and recipere, and their difference. And of Commendams granted by the Arch-Bishops.

I Have briefly set forth how, and by what meanes a Spirituall person is capable of one Benefice, with cure of soules, and what be the Incidents to make him a perfect incumbent of the same, I have also shewed by what Acts either of the Law or of the party, he may be deprived, and put out of his benefice after hee is Inducted into the same. Having thus enabled

enabled him, and ſet him a perfect incumbent of one benefice, let us ſee, whether hee bee capable of more benefices with cure of ſoules, or of more dignities in the Church then one, and by what, and by whoſe meanes he is made capable thereof.

It is moſt certaine, that by the Canon of the Church, made in the councell of Lateran: no Eccleſiaſtical perſon whatſoever, could have held *Simul & Semel*, two benefices with cure of ſoules, but upon the taking of the ſecond benefice, the firſt was abſolutely void. This Canon of the Church, though with ſome little alteration, is now confirmed by the Statute of 21 Hen. 8. cap. 13. But notwithſtanding ſuch Canon Eccleſiaſticall, yet the Pope in antient times (by uſurpation in this Realme) and the King *de jure*, might have diſpenſed with the ſaid Canon, and might have enabled the incumbent of any benefice with cure of ſoules, to have taken a ſecond benefice by a diſpenſation granted unto him: and ſo might hee have diſpenſed with him,

to

to have holden any other Dignity in the Church, together with his former benefices: and the reaſon why the King might have diſpenſed with the ſaid Canon was, For that antiently Kings and Lay Subiects were the firſt Donors of all benefices unto Eccleſiaſticall perſons, for the Donations were but *Eleemoſinæ Regum & Laicorum*; And alſo for that ſuch diſpenſations were not repugnant unto the Common Lawes of the Realme, for by the Common Law, the firſt benefice was not void, but void onely by the ſaid Eccleſiaſticall Canon: and the King notwithſtanding the ſaid Canon did give licence unto incumbents to hold two benefices with cure of ſoules: For we read that *Edmond the Monke of Bury*, held many benefices by vertue of ſuch diſpenſations: and it hath beene ſeene (ſaith *Hankford*) in 11 H. 4. 191. that one man hath beene Abbat of *Glaſſenbury*, and Biſhop of another Church *ſimul & ſemel*.

Here two queſtions may bee moved:

The

The first, If a man bee parson of a Church impropriate with a Vicar perpetually indowed: and he that is the parson accept of a presentation, unto the vicarage without dispensation, whether the same be a plurality by the Canon and by the Statute of 21 H. 8. And I conceive the Law to bee, That notwithstanding that the Parsonage and Vicarage are of severall advoutsons, and that severall *Quare Impedits*, may be brought of them, And that severall actions may bee maintained by the Parson and Vicar for or concerning their possessions: yet I conceive that the presentment of one and the same man unto the parsonage and vicarage, before the said Canon nor since to bee no plurality. First, because the Parsonage and Vicarage are both but one Cure, and that appeareth by the Proviso in the Statute of 21 Hen. 8. The words of which Proviso are, Provided alwayes, that no Parsonage that hath a Vicar endowed bee taken under the name of a benefice with cure of soules. And secondly, because the Par-

Parſonage and Vicarage are but one, the Vicarage being endowed out of the Parſonage: and a man may bee his owne Vicar: and of this opinion was *Hobart* chiefe Iuſtice of the Court of Common Plees. M. 21. Iacob. in Woodley and Mannerings caſe.

The ſecond Qveſtion is, whether the preſentation of one man unto ſeverall advouſons or livings in one Church, each of them above the value of eight pound, bee now a plurality or not: and I conceive the ſame to be no plurality. Firſt becauſe it is out of the intent and meaning of the Cannon, for the words of the Cannon are, *Plurima potiſſimum Beneficia quibus animarum Cura ſubmiſſa eſt non ſine gravi Eccleſiarum damno ab uno obtineri, cum unus in pluribus Eccleſiis ritè officia perſolvere, aut rebus earum curam neceſſariam impendere nequeat.* But in this caſe, firſt the Parſon is not in *Pluribus Eccleſiis*, but in one Church. Secondly, when there are ſeverall advouſons (as in this caſe,) one parſon hath not the whole Church,

Church, nor the whole cure of soules: and the words of the Statute of 21 Hen. 8 are, if any parson having one benefice with cure of soules, of the value of eight pound, accept and take another benefice with cure of soules, &c. But in this case he hath not one whole Benefice, nor hath he the whole cure of soules, upon the presentation of any one of the Patrons: and as in case, if a consolidation bee made of 3 churches; they are al now but on incumbency, although the advousons bee severall as to the patrons to present by turnes: and the Writ shall bee *Quare impedit presentare ad Ecclesiam*, for now upon the matter there is but one Church. So in this case, the Church upon the matter shall be but one, and the Incumbency but one: and so the same is no Plurality, either by the Canon, or within the Statute of 21 H. 8.

As the King might by the Canon Law notwithstanding the said Ecclesiasticall Canon have granted dispensations to hold divers Benefices in Comendam: so may he doe at this day,

day notwithſtanding the Statute of 21 H. 8. ſo as the ſaid Faculties and commendams bee not againſt the Lawes of God, for the power which the Pope had by uſurpation in this Realme, in granting of Faculties, Pluralities and Commendams is abſolutely now taken away by ſtat. of 25 H. 8. And by the ſaid Stat & by the ſtat. of 1 El. the ſame is transferred & ſetled in the King *de jure*, and from and under the King in Arch-Biſhops their Commiſſaries and ſufficient deputies who have the granting of them under him by authority derived out of the Crowne. But then it is to bee noted, that there is a great difference betweene diſpenſations and faculties granted in antient time by the Pope, and Faculties granted by the Archbiſhops at this day.

At this day a Diſpenſation granted by the Archbiſhop and confirmed by the Kings letters Patents (as the ſame muſt be) *retinere Beneficium cum Cura animarum*, is good onely to ſuch a perſon who is full and perfect Incumbent of the Church at the time of the grant, and is not good unto him who is not Incumbent at the time of the grant.

But it was otherwiſe ſometimes, where diſpenſatiõs were granted by the Pope.

A Prebendary of Salisbury was elected Biſhop of St. Davids, and before he was conſecrated he obteyned a diſpenſation from the Pope, *retinere* all his benefices in Comendam: & the better opini'on of the book in 11 H.4.170.213. 229. is, that the King could not have a *quare Impedit*, againſt the Biſhop for the Prebend, nor any action upon the ſtat. of 25 E.3. which gave the preſentation to the King where the Pope by proviſion gave any benefice, whereof the patronage did belong unto a ſpirituall perſon. And by *Haukford* in that caſe of Diſpenſation *retinere*, the Biſhop ſhall not pay firſt fruits: but it was there much debated, and not agreed, that if the Diſpenſation *retinere* had beene granted unto him after ſuch time that he had beene conſecrated Biſhop, whether the prebend had beene voyd: and whether any faculty could have beene granted to have inabled him, to have holden the ſame againſt the King. But at this day, the King *ex authoritate ſua regia qua fungitur*, may grant unto a Biſhop after hee is conſecrated Diſpenſation, *recipere & obtinere Beneficij*.

11.H.4.170. 213. Leveſque de S. Davids caſe.

C.4.part.75.in Hollands caſe

sum cum cura animarum, by presentation institution and induction, and to hold the same in commendam. For so the pope used to doe by usurpation in this Realme: and the same power which the pope had is by the Acts of parliament of 25 H. 8. and 1 Eliz. acknowledged to be in the king de iure.

If a man bee instituted and inducted into a benefice with cure of Soules, of the value of eight pound, and afterwards the King present him to another church which is a benefice with cure, and hee is admitted and instituted, and afterwards the Bishop of Canterbury grants him Letters of Dispensation to hold two benefices, & the king confirme the same, and afterwards hee is inducted into the second benefice, there the dispensations commeth to late, because by the institution into the second benefice, the first benefice was void by the Statute of 21 H. 8. But where a man is incumbent of a Church, and Parson or Vicar de facto, there a dispensation *retinere* the same benefice upon his promotion to the office or dignity of a *B*ishop, commeth time enough. And such dispensation or faculty granted by the Arch-bishop of

C. 4. part. 79. Digbies case.

P. 3. Car. in B. R. Buans & Ascues case.

Canterbury, or his Commissary, or by the Gardian of the Spiritualities *sede vacante* is sufficient, although the same be not inrolled in the Chancery, or in any other of the Kings Courts of Record, but onely entred into the registry of the Arch-Bishop.

7. Eliz. Dy. 233.

Le C. de Comenda in Sir Iohn Davis Reports.

The Corporation of *Kilkenny* in Ireland were Patrons of a Vicarage within the dioceſſe of *Oſory*, and preſented *A* unto the ſame, who was admitted inſtituted and inducted: and during the life of the incumbent, the Church being then full, the Arch-Biſhop of Dublyn granted unto *I. S.* then Biſhop of *Oſory*, That *unum vel plura Beneficia Curata vel non Curata retinere poſſit perpetuæ Comendæ titulo*, which was confirmed by the Kings Letters patents. *A.* dyed, and the Church being voyd by ſix moneths, the Biſhop of Oſory by vertue of the ſame diſpenſation did reteine the vicarage in Comendam, and itwas holden there, by many good lawyers, that the Facultie was well executed unto the Biſhop by his Acceptance without any preſentation, inſtitution or induction unto the ſame; for it was ſaid, that thoſe Ceremonies were

p. 41. Eliz. Rott. 205. in Co. 1. B Cromptons caſe adiudg. acc.

were not neceſſary for the conferring of the vicarage unto the Biſhop, becauſe the ſame might have bin done by other wayes, viz. by Union or Appropriation, for ſo was it in Grendons Caſe. But quere of that Caſe, for it was not adiudged: and the Biſhop was not there the preſent incumbent of the Church, and ſo the Comendam retinere (as before is ſaid) voyd according to the opinion delivered in Hollands Caſe. And yet I have ſeene Report Trinit. 11 Iac. in Col. B. of the Caſe betwixt Colt and the Biſhop of Coventry and Lichfield. Where ſuch a Diſpenſation granted by the Deane and Chapter Guardians of the ſpiritualties *ſede vacante* of the Arch-Biſhop unto the B. of Cov. and Lichfield, *retinere any Beneſice*, under the value of two hundred markes *per an.* in Comendam, and that he might hold the ſame without any preſentation, admiſſion, inſtitution or Induction, was pleaded by the Biſhop, and the plea holden to be good. *Ideo Quere.* Plo. Com. 500.

CHAP. XX.

Who may bee dispensed withall to have Plurality within 21 H. 8. Of Reteyner of Chaplaines, & how many chaplaines, Noblemen, and Officers of Honour and Place may reteine, what shall be said to be a good reteyner of a chaplaine, and where dispensation granted to such Chaplaine for plurality shalbe good, where not.

WHat persons are capable of Plurality, and to grant them, and what not appeares by the Statute of 21 H.8.cap.13. The King, Queen, Prince and their children are not limited within the Statute how many Chaplaines they shall retaine. And therefore they may retaine as many chaplaines as they please, and every of their chaplaines may purchase a Dispensation to have a Plurality. But Arch-bishops, Bishops, Dukes, Earles, Barons, Countesses and other officers of honour and place, named in the Statute, are stinted how many chaplaines every of them may reteine, who are capable of dis-

pen-

penſation to have Plurality.

A Counteſſe may retaine two chaplaines within the ſtatute, and each of them may purchaſe diſpenſation to to have two benefices with cure: but if a counteſſe who is a widow doe retaine two chaplaines, and afterwards retaine a third chaplaine, and the third Chaplaine doth before any of the other two purchaſe diſpenſations to hold two Benefices with cure, his firſt Benefice being of the value of 8 pounds. The firſt Benefice is voyd by ſtatute: for when the Counteſſe hath reteined two chapleynes, theſe two are onely capable of diſpenſation within the Statute: and the reteyner of the third chaplaine cannot deveſt the capacitie of diſpenſation which was veſted by their reteyner in the firſt two chaplaines, and therefore the diſpenſation purchaſed by the third chaplaine is voyd, and his firſt Benefice voyd by the ſtatute. C.4.part.90. Druries caſe

If a Baron who is allowed but three chaplins reteines ſix by his letters teſtimoniall, and all ſix are preferred to ſix ſeverall Pluralities; the three firſt are onely warranted by the ſtatute, and 14 El.Dyer 312.

Diſpenſation for Pluralitie purchaſed by them onely is good. And the three laſt ſhall not bee reputed his Chaplins within the Statute ſo long as the three firſt are in his ſervice, or are living: and therefore the purchaſe of Diſpenſation by the three laſt, for Pluralities, are meerely voyd.

C.4.part.90. If a Baron reteine three Chaplins according to the Statute, and each of them purchaſe a diſpenſation for Plurality, and are advanced according to the Statute: if the Baron afterwards diſcharge one of them of his ſervice, he cannot reteine another during the life of him that is diſcharged, for then the Statute ſhould bee defrauded, and hee might advance Chaplins without number.

P.28.Eliz.in Co. B.Rot 1130. Savacres caſe.

C.4.part.118. Aſtons caſe. If a Counteſſe, that is a widow, doe reteyne a Chaplaine, and he purchaſe a diſpenſation for Plurality, and afterwards the Counteſſe marrieth with a Peere of the Realme, and afterwards the chaplaine is admitted, inſtituted and inducted into a ſecond Benefice, with cure, this is well and good in Law, for that the reteiner was not countermanded by the entermarriage: but

if

if an Earle or Baron retaine a Chaplain, and before the chaplaine bee advanced unto any Benefice, the Earle or Baron bee attainted; now is the retayner determined, and the Chaplaine cannot purchaſe diſpenſation to have a ſecond Benefice, becauſe hee that is attainted is dead in Law, and thereby the retayner is determined before the diſpenſation obtayned, and therefore if ſuch a Perſon having one Benefice with Cure of Soules, doe afterwards without other Diſpenſation obtained, purchaſe or take another Benefice, the firſt Benefice is voyd by the Statute.

C. 4. part 119. ſee Countee de Weſtmerlands caſe.

The Statute of 21 H.8.cap. 13. ſhall be conſtrued largely againſt Pluralities, as preiudiciall unto the Service of God, and the inſtruction of the people. And therefore if a Biſhop bee tranſlated and made an Arch-Biſhop, and hold both Dignities: or if a Baron be created an Earle, although hee hath both the Dignities and Honours conioyned in one perſon; yet ſhall hee have but ſo many Chaplains as an Arch-biſhop or Earle may have, who ſhall bee capable of Diſpenſation to hold two benefices with cure of ſoules.

If

18. Eli. Dyer 347.

If a man long before the making of the ſtatute of 21 H. 8. hath a diſpenſation from the Pope for a Plurality, and at the time of the making of the ſtatute of 21 H. 8. hath one benefice with cure of ſoules of the yearely value of eight pound, and within a yeare after the making of the ſtatute of 28 H. 8. cap. 16. he obteynes a confirmation of his former diſpenſation with words in the confirmation to hold, uſe and enioy the effect of his diſpenſation, yet by the opinion of *Mounſon* and *Manwood* Iuſtices, the firſt benefice is voyd by the Statute of 21 H. 8. and the ſtatute of 28 H. 8. cap. 16. doth not reſtore him to the ſame without a new preſentation: notwithſtanding that the ſtatute of 28 H. 8. made the Buls of diſpenſation made by the Pope good for one yeare, and that if they bee ſurrendred within the yeare, that the chancellor of the augmentation may grant a new diſpenſation unto him. But by Dyer Iuſtice, as the Statute of 21 H 8. made the firſt benefice voyd, ſo the ſtatute of 28 H. 8. cap. 16. did reſtore him to the benefice, for when two ſtatutes are croſſe in appearance one to the other, and no clauſe

clauſe of *non obſtante* is contained in the ſecond ſtatute, ſo that one may ſtand with the other, ſuch conſtruction ſhall bee made of the ſtatutes, that both of them ſhall take effect.

The Statute of 21 H. 8. would not that there ſhould be a paritie or equality of all perſons in the pale of the Church, *nihil enim eſt maius inæquale quam Æqualitas*, and therefore the ſtatute provided, that ſome miniſters and Eccleſiaſticall perſons ſhould have the precedency of others.

Firſt, in reſpect of the perſons upon whom they were attendant.

Secondly, in reſpect of their births and blouds.

Thirdly, in reſpect of their degrees, they have taken in the two Vniverſities within the Realm. And therefore, Firſt the chaplins of the King, Queen, Prince, and other their children may have as many benefices with cure of ſoules, as it ſhall pleaſe the King, Queene or their children, to conferre upon them of any value whatſoever. So every Arch-Biſhop may have eight Chaplaines, becauſe he muſt uſe eight at the Conſecration of every other Biſhop. E-

very

Every other Biſhop foure Chaplaines, every Duke ſix Chaplaines, every Earle five Chaplaines, every Baron of the Parliament three Chaplaines, every Dutcheſſe, Marqueſſe, Counteſſe or Baroneſſe Dowager two chaplaines every Knight of the Garter three chaplaines; and every one of their chaplaines may purchaſe licence or diſpenſation to have a Plurality of any value whatſoever; Secondly in reſpect of their births and blood: ſo the brethren and ſonnes of all Temporall Lords borne in Wedlocke, may have a diſpenſation to keepe as many benefices as the chaplaines of a Duke, or Archbiſhop. The Sonnes and Brethren of every Knight, may purchaſe diſpenſation to take two benefices with cure of Soules, Thirdly, in reſpect of their degrees: ſo all Batchelors & Doctors in divinity, Doctors of Law, & batchelors of the Canon Law, who were admitted to their degrees by the Univerſity, and not of Grace, may purchaſe licenſe or diſpenſation to keepe two benefices with cure of Soules: Inſomuch, that if we conſider the Nobility now in England, the Officers of Honor and place, the Sons

and

and Brethren of Noblemen & Knights, and other deſerving men within the Realme, who have taken the degrees before ſaid: it cannot be thought, but that all or the moſt part of the clergy men, within the Realme of England, have at this day, or may have Plurality, of two benefices with cure of Soules. Againe if we looke upon the parochiall Churches within the Realme. The Dignities of Arch-deaconries, Deaneries, Prebends, and other Eccleſiaſticall Dignities given to perſons within the Realme. It cannot bee imagined, but that all Schollers, Miniſters, and other Eccleſiaſticall *Perſons* within the Realme, of Learning and Merit, are now better provided for, by this Law of 21 H. 8. then they were in antient times, when Diſpenſations for Pluralities, Commendams and Faculties were granted and obteyned by the Clergy of England from the biſhop of Rome.

Chap.

CHAP. XXI.

What right or interest the Parson or Vicar have to the Church, Of the rights of the patron and ordinary. In whom the fee simple of the Glebe of the parsonage or Vicaridge is: Who shall be said to bee the patron of a Vicarage endowed. What actions the parson or Vicar may have for the freehold of the Church. And whether a Juris utrum *will lye by the Vicar, against the Parson for the Glebe of the Vicarage.*

BY degrees I have brought the Clarke presented, not only into the reall possession of one Church or Benefice with cure; But have shewed unto you, that if he be qualified within the Statute of 21. H. 8. how that hee may purchase License or Dispensation to take, and receive *Pluralitie* or two Benefices with cure of Soules.

Now

Now it remaineth, that I declare unto you, what right or intereſt the parſon or Vicar have in the Church, or Glebe Lands after their induction into the ſame, And what right or intereſt the Patron and ordinary, have likewiſe in the ſame, their rights unto the Advowſon, and to the Church and Glebe Lands are of ſeverall natures, The Parſon hath *Ius poſſeſſionis* a right unto the poſſeſſion of the Church and Glebe, for that the parſon hath in him the freehold, and is for to receive the profits of the Church and Glebe, and the Oblations, Tythes and offerings to his owne uſe; The patron hath *Ius præſentationis* a right of preſentation of his Clarke unto the Ordinary to bee admitted, Inſtituted, and Inducted into the Church; The right of the ordinary is *Ius Ordinationis* a right of enabling and inveſture it of the incumbent, and for to ſee the cure ſerved, The parſon hath *Ius habendi*, *Ius poſſidendi*; *Ius retinendi*; he may have, poſſeſſe, & retaine the profits, Tithes and Offerings to his owne uſe without the patrons & ordinaries conſent, & nothing can be done by them during his Incumbency to

charge

charge the Church or his ſucceſſors without his conſent or agreement. But the rights of the Patron and Ordinary are onely collaterall Rights: for that none of them can have or retaine, or poſſeſſe the Church or Glebe themſelves: and yet the Patron and Ordinary have *jus diſponendi* a kinde of diſpoſition in the Church: for that no charge could have been layed upon the Church in perpetuity to have bounden the Succeſſors of the Parſon, unleſſe the Patron and Ordinary had agreed thereunto; and therefore, if a Writ of Anuity had beene brought againſt the Parſon, and hee had prayed in aid of the Patron and Ordinary: and the Patron had made default, and the Ordinary appeared and confeſſed the action, or if the Ordinary had made default, and the Patron confeſſed the action; This ſhould not have bounden the Succeſſor of the Parſon: but if they had both appeared and ſaid nothing; by the common Law, this ſhould have bounden the Church in perpetuity, for *Qui tacet conſentire videtur.* But if the Parſon himſelfe with the conſent onely of the Ordinary, had granted unto another

11.H.8.7.
19.H.6.75.
21.H.6.3.p.8.
39.H.6.10 p.14
28.H.6.1.p.2.
16 E.3.Anu.24
20 E.3.Anu.32
7 E.4.40.
40 E.3.30.
C Litt.343.344

ther Man an anuity out of the Glebe having *quid pro quo* in conſideration therof, this ſhould have bounden the Succeſſour of the Parſon at the Common Law, without the conſent of the Patron. Alſo in ſome caſes, the Act of the Patron himſelf alone would have bounden the Incumbent: and therefore, if a Recovery had bin had by Action tried againſt the Patron, where the right of the Patronage had bin in queſtion, there the preſent Incumbent ſhould not have put the right againe in triall, but he ſhould have bin bounden thereby by the Common Law; nor was he aided by the Statute of 25. E.3.cap.7. if the Patron had not pleaded faintly, but the Parſon ſhould have bin bounden by the judgement; yet by the opinion of *Fitzharbert.* in his *Natura Brevium*, the Succeſſour of the Parſon, after ſuch recovery had by Action tried againſt his predeceſſour, might have had a *Ius utrum*, notwithſtanding ſuch recovery. But the Parſon himſelfe, as I ſaid before, hath the Freehold in him, and hath the right of the Church & Churchyard, and Glebe in him; of which, if he be put out of poſſeſſion, or diſſeiſed, he

28.E.3.24.br. Q.166.

may have or maintaine an Action of Treſpaſſe, or an Aſſiſe: for it is agreed, that for ſuch things as are annexed unto the Church or Glebe, or for cutting downe of trees, or doing of treſpaſſe in the Churchyard or Glebe, the Parſon ſhall have an Aſſiſe, or his Action of treſpaſſe, for that the right and intereſt of them is in the Parſon: but for ornaments of the Church, or for the bels in the Steeple, the Parſon ſhall not have the action, if they be taken away, but the Churchwardens. If a ſeat be ſet in the Church, and afterwards the ſame be taken away by a ſtranger, the Parſon ſhall not have any action, and the reaſon thereof is, becauſe the ſame is not fixed unto the Freehold; but in ſuch caſe the action is given to the Churchwardens, or unto the party to whom the ſeat doth appertaine.

11.H 4.12.
17.H.3.prohibition 26.
38.H.6. L. conſ. 1. per Markham.
31.H.4.12.
8.H.7. 12.

If the Coat Armour, Scutchians, pendents of armes of any Nobleman or Gentleman, that are hung in the Chancell, or in the body of the Church, in honour of the party buried there; or if the Graveſtone that covereth the body be taken away by the Parſon or Vicar, an action will lye againſt them by the

5.E.4.14.

the heire or Executour of the party buried there; for theſe are not oblations, nor belong unto the Freehold of the Church. But ſuch is the intereſt of the Parſon in the Freehold or Glebe of the Church, that, as before is ſaid, he ſhall maintaine an Aſſiſe thereof; and yet if he be impleaded in any action reall for the Freehold, he ſhall have aid of the Patron and Ordinary.

But the Freehold being in the Parſon, it hath bin much controverted in our Bookes, in whom the feeſimple of the glebe of the Parſonage is. Firſt, ſome authorities are, and ſome are of opinion, that the Parſon hath the Feeſimple of the Glebe in him, and that for theſe reaſons: firſt, they ſay, that a Parſon is a Spiritual corporation, and lands may be given unto him in Frankalmoigne, and every gift in Frankalmoigne ſetleth the Feeſimple in the donee, and ſuppoſeth a Feeſimple to paſſe, and therein the Feeſimple doth paſſe without the word (Succeſſours.) Secondly, they ſay, that a Parſon hath brought a *Quod permittat*, which is in the nature of a Writ of right of a Common, and counted, that he was ſeiſed

31 E. 1 Q. 101 permit 8. F.N.B. 50. h.

en fee, & droit, and the Writ hath bin admitted to lye by the agard of the Court: alſo a Parſon brought a *Quod permittat* of the ſeiſie of his Predeceſſour of Eſtovers, and counted of a ſeiſin in fee, and joyned the miſe upon the meere right; and it is ſaid by *Paſton* in 8. H. 6. 24. that a Parſon may joyne the miſe upon the meere right. If the Parſon dye, the Freehold of the Glebe is not in the Patron; neither can any action be brought for the Glebe, untill there be another Parſon: and it is the better opinion of the booke 8. H.6.24. that in a *Precipe quod reddat*, or in a *ſcire facias* for to execute a recovery in a Writ of *Ceſſavit*, he ſhall not have aid: thirdly, they ſay, that if a Parſon doe make a leaſe for his owne life, that he hath a reverſion in him, and may be vouched. And this appeareth, for that in a Formedon brought againſt I.S. the tenant pleaded, that W. was Vicar of the Church of S. and made a leaſe to him for life, and vouched the Vicar, who entred into the warrantee, and pleaded, that he found the Church ſeiſed of the Lands as parcell of the Glebe of the Vicarage, and that A. was

Vi.E.3. Quod permittat 9.

8.H.6.24.

9.E.3. Iuris utrum. 18.

9.E.3. Aid. 19.

Parſon

Parſon of the Church, and prayed in aid of him, and the aid was granted. By which caſes, ſay they, it appeareth, that voucher and aid prayer ſhall be had againſt a Parſon: fourthly, they ſay, that the Feeſimple is in the Parſon, and not in the Patron; and that is proved by the words of the Writ of *Juris utrum*, which are, *utrum ſit libera Elemoſina Eccleſiæ*, and not of the Patron. But notwithſtanding theſe reaſons and authorities, I hold the Law to be, that the Parſon hath not the abſolute Feeſimple of the Glebe in him, and at the moſt, but a qualified Feeſimple: and that the abſolute Feeſimple, according to the opinion of *Littleton*, is in obeyance, or in *Nubibus*, that is to ſay, in the intendmẽt or conſideration of the Law; and it was provided, that it ſhould be ſo, by the wiſdome and policy of the Law, that the Parſon and Vicar, who have *curam animarum*, and are bounden to celebrate divine Service, adminiſter the Sacraments, and the like, might have ſomewhat to live upon: and therfore the Law provided, that the Feeſimple of the Glebe ſhould be out of them, that no alienation, or diſcontinu- C. Litt. 341.

ance thereof made by them might be a barre unto the Succeſſour, and ſo leave him deſtitute of maintenance; and for that he could not by the wiſedome and policie aforeſaid, diſcontinue the glebe Lands (for every diſcontinuance gave a fee,) It followeth that the abſolute Feeſimple of the glebe was not in him: neither could the Parſon have or maintaine a Writ of Right, or other Writ grounded upon the meere right, which is a manifeſt proofe that hee hath not the abſolute Feeſimple of the glebe in him.

21.E.4.86.

An Aſſiſe of *Novel diſſeiſin* was brought againſt a Parſon of part of his glebe Lands; and he pleaded, that he was preſented unto the Church by the King, and prayed in aid of the King, and the aid was granted; and aid ſhall never be granted to one that hath the abſolute Feeſimple of the Lands in him.

43.Aſſ.13.

If a Writ of right be brought againſt a Parſon, and after the miſe joyned he make default, and judgement be given againſt him, upon his default; this ſhall not binde the Succeſſour of the Parſon, but he ſhall have a *Iuris utrum*, becauſe the

8.H.6 26.
19.H.6.39.
10.H.6.5.
C.6.part Ferrers caſe.

the Parſon did not pray in aid of the Patron and Ordinary; and he had not the meere right in him to loſe by his default: and in that caſe the Parſon himſelfe might have had a *Iuris utrum*, notwithſtanding the barre in the former action; for that is his writ of right, and a writ of the higheſt nature that a Parſon can have. Litt.hert.646.

Vicarages were originally endowed out of Parſonages, and the Vicar was to have aid of the Parſon, if he were impleaded for any thing concerning his Vicarage, and the Parſonage was ſubject unto every charge of the Vicarage; and the Vicar in ancient times was not eſteemed the tenant of the Freehold of the Vicarage, but the Freehold thereof was in the Parſon, and the Vicar himſelfe was not ſuch a perſon againſt whom the lands of the Vicarage could be demanded: neither did any *Precipe* lye againſt him as Vicar, nor could he maintaine an Aſſiſe in his own name: but yet I finde in 4. E. 3. *brc.* 704. a writ of Intruſion was brought againſt a Vicar, who pleaded unto the Writ, that the Freehold was in the Parſon, and notwithſtanding that plea, the 31.H.6.13. per Yelverton 9.Aſſ.3. 40.E.3 27. 8.Aſſ 36. 15.Aſſ 8. acc. 12.E.3.brc. 256. 4.E.3 brc.704

writ did not abate: but the reaſon of that caſe might be, for that the intruſion was a tortious act, and a perſonall wrong; and therefore the perſon of the Vicar was charged therein. But yet note, in that caſe, that the Vicar had aid of the Patron and Ordinary; by which it appeareth, that the Freehold was in the Vicar himſelfe, but not the Feeſimple of the glebe of the Vicarage. And I hold the Law to be, that the Freehold of the glebe of the Vicarage is in the Vicar himſelfe, and not in the Parſon; for that the poſſeſſions of the Vicar and Parſon are ſevered, and every of them ſhall have ſeverall Writs concerning the rights which doe appertaine unto them, and ſhall not joyne in any Writ; and they ſhall pay the tenths, and other charges liable upon their ſeverall glebes, ſeverally by themſelves; and the Vicar at this day ſhall have and maintaine a writ of *Ius utrum* againſt the Parſon, who is his Patron, for the glebe of the Vicarage. By all which it appeareth unto mee, that the Freehold thereof is in the Vicar upon the very endowment: and for the abſolute Feeſimple of the Glebe of the Vica-

Vicarage, the ſame is in the conſideration and intendment of the Law, in ſuch manner as the Feeſimple of the glebe of the Parſonage is, in the caſe of the Parſon, as before is ſaid.

Before I conclude this Chapter, it wil not be impertinent, concerning the right of Patronage, to determine a queſtion made in our Bookes, which is this, If there be a Parſon with a Vicar endowed in one Church, and the Vicarage become void, Who ſhall preſent? and who ſhall be ſaid to be the Patron of the Vicarage? whether the Parſon, or the Patron of the Parſonage? In 17.E.3.51. ſome of the Iudges are of opinion, that the Advowſon of the Vicarage doth appertaine unto the Parſon: others, that it belongeth unto the firſt Patron, and the Court is divided in opinion. 2.E.3.Q.I.165. put the caſe, That although the Vicarage be made with the aſſent of the Patron and Ordinary, yet the Advowſon of the Vicarage doth remaine in the Patron, becauſe the ſame is parcell of the advowſon of the Parſonage, 16.E.3.gran.65. It was a queſtion, if by the grant of the Advowſon of the Church, the Advow-

17.E.3.51. 17 E.3.76.acc

2 E.2.Q.I. 165.

16.E.3.gr.65

ſon

ſon of the Vicarage did paſſe: and by *Stone* it doth paſſe as incident to the Parſonage; and 31.H.6.13. & 14. by *Hengſton* the Parſonage and Vicarage are all one; and he who is Patron of the Parſonage is Patron of the Vicarage, and *Forteſcue* doth agree the ſame. But notwithſtanding theſe authorities, I conceive firſt, that *de jure*, the Parſon is Patron of the Vicarage, unleſſe upon the endowment of the Ordinary it be otherwiſe provided: and ſo ſaith *Fitzherbert* in his *Natura Brevium*. 33. *b*. that the preſentation to the Vicarage doth belong unto the Parſon of common right, if it be not otherwiſe agreed unto, 2.H.3. gr. 89. *Perkins* 123. if a man by fine grant the Parſonage, ſaving the preſentation to the Vicarage, it is a good ſaving; and the Parſon ſhall preſent when the ſame is void. Secondly, common experience is, that where there was an Appropriation, and a Vicar endowed, that the perſons to whom the Appropriation was made, wee alwayes accounted Patrons of the Vicarage; and ſo E.3.26.b. an Abbot who had an Advowſon appropriate upon which there was a Vicar endowed, did

31.H.6.13. & 14.

2.H.3.gr.89. Perkins 123.

50.E.3.26.b.

pre-

ſent unto the Vicarage, wherewith agreeth the Booke 17. E. 2. Q. I. 178. Thirdly, it is manifeſt by reaſon, for as the Patronage of the Church doth appertaine unto him who was the firſt founder of the Church, and firſt endowed the ſame with Lands; ſo, in regard the endowment of the Vicarage is taken out of the Parſonage, and out of the eſtate of the Parſon; and if he be impleaded of his glebe, hee ſhall have aid of the Parſon; and alſo if the Vicarage be diminiſhed, the Ordinary may encreaſe the endowment, or new endow it out of the Parſonage, as the booke of 31. H. 6. 13. is. It is reaſon that the Parſon have the Patronage of it. Againe, the Vicar is ſubſtitute to the Parſon, and his endowment at the firſt was onely for the eaſe of the Parſon; and it belongeth unto him to ſee that there be a fit and honeſt man, of whoſe care and learning he may be aſſured for to Officiate the Cure: and therefore it ſtandeth with good reaſon, that the Parſon be his Patron, and preſent ſuch an one to the Vicarage as ſhall be ſufficient, and of ability to ſerve the Cure. And therfore notwithſtanding the former

mer Authorities, I conceive that the Patronage of the Vicarage doth *de jure* belong unto the Parſon, and not to the firſt Patron of the Parſonage appropriate.

Chap. XXII.

Of Vſurpation, and where the ſame ſhall put the rightfull Patron out of poſſeſſion of the Church, or barre him of his preſentment, where not.

I Have in the former Chapter conſidered of the Rights of the Patron, the Ordinary, and the Incumbent: and what remedy the Incumbent hath if he be diſſeiſed, or ouſted of his Church, or glebe Lands. Let us now returne to the Patron, and ſee by what and by whoſe acts the Patron may be ouſted of his Advowſon or Preſentment: I ſaid before, that Patrons might be ouſted of their Advowſons, by Diſſeiſins, Diſcontinuance of the Mannors or Lands to which the Advowſons were appendants,

dants, and by uſurpations. Of Diſſeiſins, and the diſcontinuance of the Mannors or Lands, and where the Patron ſhall preſent before his entrie, or that he recontinueth the Mannors or Lands, I have ſhewed in the ſixt Chapter. In this I will declare where an Vſurpation ſhall put the rightfull Patron out of poſſeſſion of the Church, or barre him of his preſentment, and where not.

Vſurpation is, where a ſtranger who hath no title to the Advowſon, the Church being void, doth preſent his Clarke to the Biſhop, or Ordinary; and the Ordinary doth thereupon admit and inſtitute the Clarke preſented into the Church: this preſentation is a diſturbance and uſurpation, and doth put the rightfull Patron out of the poſſeſſion of the Church. And this appeareth by the Statute Weſt. 2. cap. 5. *Cum aliquis jus preſentandi non habens preſentaverit ad aliquam Eccleſiam cujus perſonatus ſit admiſſa.* For no man can be put out of the poſſeſſion of his Advowſon, but by admiſſion and inſtitution upon a preſentation onely: for if a Biſhop doth collate unto the Church without title, and C. Litt. 344 C. 6. part 30.

and his Clarke be inducted; this doth not put the rightfull Patron out of poſſeſſion, for that it ſhall be taken onely proviſionally made to officiate theuCre for celebration of divine Service, untill the Patron doth preſent.

30. Eliz. in Com. B. Jurdens caſe.

14. H. 7. 2.

At the Common Law every preſentation to the Church, did put the rightfull Patron out of poſſeſſion, and put him to his Writ of Right of Advowſon; whether the preſentation were by tithe or without tithe. And therefore at the Common Law if A. being ſeiſed of an Advowſon, had levied a fine therof unto B. and his heires; and afterwards the Church doth become void, and A. had preſented by uſurpation his Clarke unto the Ordinary, who had bin admitted, inſtituted and inducted, this ſhould have put the Patron out of poſſeſſion. And ſo it was, if A. had recovered againſt B. an Advowſon in a writ of right of Advowſon, and had had finall judgement, and afterwards the Incumbent had dyed, and B. by uſurpation had preſented his Clarke to the Church, who had bin admitted and inſtituted, and afterwards B. had dyed, this ſhould have put A. out of poſſeſſi-

8. E. 2. Q. I. 168.

45. E. 3. Q. I. 139.

C. Litt. 238.

on,

on, and the heire of B. ſhould not have bin bounden, in regard of the judgement either in blood or eſtate, but he ſhould have preſented: and the reaſon of both the ſaid caſes was, for that every preſentation did put the rightfull Patron out of poſſeſſion; and therefore, albeit in both the ſaid caſes, the uſurpation was before execution, yet the rightfull Patron was thereby put out of poſſeſſion, and the uſurper had gained the inheritance of the Advowſon thereby, and the preſentment of the rightfull Patron for that turne, loſt for ever.

At the Common Law, if an uſurpation had bin made upon an Enfant, or a feme covert, they had bin put out of poſſeſſion, and had bin put to their writs of right of Advowſon; and the reaſon thereof was, becauſe the Incumbent came in by judicial Act of the Ordinary, *viz.* by admiſſion and inſtitution; and it was preſumed that the Ordinary would not have done any wrong, or aſſented unto any wrong to be done to the Patronage of the Church. But yet at the Common Law, if one had uſurped upon the King, and his

6.E.3.28. 39.E.3.24. 43.E.3.15. 50.E.3.13.b.

his Clarke had bin admitted, inſtituted and inducted; yet this ſhould not put the King out of the Advowſon, or barred him of his preſentment, by reaſon *nullum tempus occurrit Regi* by his Prerogative; but the King might have recovered his preſentment by a *Quare Impedit*, for that the King was not bound by the Plenarty. If the King have an Advowſon in the right of his Ward, and a ſtranger uſurpe, and his Clarke is in by ſix moneths before the King bring his *Quare Impedit*, yet this Plenarty ſhall be no good barre againſt the King; and the reaſon thereof is, becauſe the King ſhould otherwiſe be without remedy; for a writ of right of Advowſon he cannot have, having an eſtate in the Advowſon but as Guardian; and therefore in that caſe *nullum tempus occurrit Regi*: for elſe a ſtranger might hold a thing onely by wrong againſt him without any good ground: yet in that caſe the King ſhall not put out the Incumbent without a *Quare Impedit* brought, for ſo is it provided by the Statute of 13. R. 2. cap. 1. But if the King hath title to preſent, by reaſon of lapſe, and the Patron uſurpe and preſent his Clarke,

C. 6. part in Boſwels caſe acc.

F. N. B. 36. K.

Stan. prerog. 32. 33.

C. 7. part in Haſkervils caſe.

Clarke, who is admitted, instituted and inducted, and then dyes, the King hath lost his presentation, and shall not have the second presentment by his prerogative, for there *Tempus occurrit Regi*, and the Kings interest was specially limited, and the six moneths was the substance of his tytle.

Vpon presentation unto an Advowson, the interest of the presentour is to be considered; for in some case a Presentation, although it seeme to be by usurpation, shall not put the Patron out of possession. And therefore if a man be seised of an Advowson in Fee, and grant three avoydances unto one man to take effect one immediately after the other, and the Church become void, and the grantour himselfe presents his Clarke, who is admitted, instituted and inducted, and afterwards the Church doth become void againe; the grantee shall present unto the second avoydance, for that hee was not put out of possession by the first presentment; for the grantor had the franktenement and Fee of the Advowson in him, so that he could not make any usurpation to gaine any estate thereby, to put the grantee C.Litt. 249.

out of poſſeſſion; and alſo in reſpect of the privity of contract betwixt the grantor and the grantee: the preſentment of the grantor did not put the grantee out of the two laſt avoydances.

22.E.4.4. 12.H.8.1.in Kelloway. If two Coparceners be of an Advowſon, and they make compoſition to preſent by turnes, and one of them uſurpe in the turne of the other, this uſurpation doth not put the other out of poſſeſſion, becauſe they claime both by one title: and ſo it is, if two joynt-tenants be of an Advowſon, and one preſent his Clarke, who is admitted, inſtituted and inducted, this doth not put the other out of poſſeſſion; but if the joynt-tenant that preſented dye, the preſentment of the other joynt-tenant ſhall ſerve to make a title by in a *Quare Impedit* brought by the ſurvivour.

35.H.8 br.370 17.E.3.37.b. 15.E.3.Darr. preſent.11. 2.R.2.Q.1. 102. 27.H.8.11.acc

If an Advowſon be granted to one for life, the remainder unto another in Fee, and the tenant for life dye, and afterwards a ſtranger uſurpe, and the ſixe moneths paſſe, in this caſe he in the remainder was without remedy by the Common Law; for he could not have a writ of right of Advowſon, for that writ

1.H.4.3. per Skrene. 22.H.6.26.b.

writ was not maintenable, but of his owne poſſeſſion, or his Anceſtours; and an Aſſiſe of Darrein preſentment or *Quare Impedit* he could not have, becauſe the ſix moneths were paſt: and ſo although he had the right of the Advowſon in him, yet this uſurpation ſhould have bound him, for that he had not any Action for the recovery of his right: and ſo was it, if tenant for life of a Mannor, unto which an Advowſon was appendant, had ſuffered an uſurpation, and the tenant for life had dyed, he in the remainder was without remedy for this uſurpation. And although the words of the Statute of Weſt. 2. cap. 5. are *habeant eandem actionem & recuperationem per breve de Advocatione poſſeſſorium, qualem haberet ultimus anteceſſor.* Yet at this day I conceive the Law to be, that they ſhall be aided by the Statute of Weſt. 2. cap. 5. notwithſtanding this uſurpation upon tenant for life. 7. E. 2 *Statham*, Q. I. 34. A purchaſor was received in an aſſiſe of Darrein preſentment, to avoid an uſurpation had upon tenant in Dower. 17. E. 3. 19. It is admitted for Law, that if tenant for life ſuffer an uſurpatio, he in the

21. E. 4. 1. a.

7. E. 2. Statham Q. I. 31.

17. E. 3. 19.

reverſion ſhall avoid it after the death of tenant for life. 45. E. 3. by *Finchden*. If a ſtranger uſurpe upon a tenant for life, and afterwards the tenant confirme his eſtate in Fee, and the ſtranger preſent two or three times, and tenant for life dye, and the Church void, I ſhall preſent, and upon any diſturbance I ſhall have and maintaine a *quare impedit*; for the Statute of Weſt. 2. cap. 5. being made for to ſuppreſſe wrong doing, ſhall be taken largely; and ſo was it adjudged in the Court of Common Plees, *Paſc.* 14. *Iac. Rott.* 1030. in the Lord *Stanhops* and *Williams* caſe, where the caſe was, that a Prior did grant the next avoydance, and the grantee ſuffered an uſurpation; and it was adjudged, that the Prior himſelfe might have bin aided by the Statute of Weſt. 2. cap. 5. and had a *Quare Impedit* upon this uſurpation; and ſo was the Law then taken to be for every leſſour, upon an uſurpation had upon his leſſee.

7. E. 3. Darr. preſent. 2. 18. E. 3. Q. I. 195.

Againe, the time of an uſurpation is alſo conſiderable. If an uſurpation be had upon one to an Advowſon in the time of war, this uſurpation doth not put the rightful Patron out of poſſeſſion, although

though the Incumbent be inſtituted and inducted in time of peace; for the Law reſpects and lookes backe upon the originall act, which is the preſentment, and the ſame being in time of warre, the war doth not onely give priviledge to them that be in the warre, but to all others within the kingdome; and therfore although the admiſſion and inſtitution be in time of peace, yet the preſentment being in the time of war, the ſame doth not put the rightfull Patron out of poſſeſſion. So if an uſurpation be had upon an Abbot or Biſhop *ſede vacante*, this uſurpation ſhall not prejudice the ſucceſſour, but that hee ſhall have a *Quare Impedit*, and thereby remove the Incumbent, and ſhall preſent; but if ſuch uſurpation had bin in the time of his predeceſſour, it ſhould have put the ſucceſſor out of poſſeſſion, if the ſix moneths were paſt.

C. 1. part Shelleys caſe. acc.

F. N. B. 34. 9. E. 3. 16.

If the Patron of a Benefice be outlawed, and the Church become void, ſo as title to preſent is come unto the King, in regard of the Outlawry, and a ſtranger uſurpe upon the King, and ſix moneths paſſe, and the King brings a *quare impedit*, and removes the Incum-

22. Aſſ. 33.

bent; now is the Advowſon reconti-nued unto the rightfull Patron, and the uſurpation whileſt the title was in the King, did not gaine the inheritance out of the rightfull Patron, but that he after the Outlawry reverſed or pardoned, might preſent unto the Church being then void; but yet the rightfull Patron by his own act may make the preſentation by uſurpation good. As if two men preſent by uſurpation unto a Church, and their Clarke be admitted, inſtituted and inducted, the Patron may releaſe his right in the Advowſon to one of them, and thereby deſtroy his owne title, and the ſame is good, and as to the preſentment ſhall enure to the Clarke of them both, and ſhall eſtabliſh the Clark in the poſſeſſion of the Church; for that the Clarke comes not in meerely by wrong but by admiſſion and inſtitution, which are judiciall acts of the Ordinary, and in ſuch caſe, hee to whom the releaſe is made, ſhall not now put out the Clarke, although hee hath rightfull title to the Advowſon; but the Clark ſhall be now ſaid to be in by them both, and his title made good by the releaſe of the rightfull Patron.

CHAP.

Chap. XXIII.

What remedy the Patron hath for to recover his Advowſon or Preſentment upon uſurpation. And of the Writs, Droit de Advowſon, Aſſiſe de Darrein preſentment, and Quare Impedit.

IF an uſurpation be had upon the Patron of his Advowſon, or if he be diſturbed in his preſentment, the Church being void, the Law hath provided ſeverall Writs and remedies for the recovery of the Advowſon, and for the removing of the Incumbent. The Writs which the Law hath given unto the Patron, is either a Writ of right of Advowſon, an Aſſiſe of Darrein preſentment, or a *Quare Impedit*. The firſt is a Writ for the recovery of the right of the Patronage; the other two are Writs concerning the poſſeſſion. The writ of right of Advowſon is a writ of the higheſt nature that the Patron can have, and lyeth onely for him that hath a Fee-

ſimple in the patronage, and doth not lye for him that hath but an eſtate in tayle, or any other inferiour particular eſtate.

If a man hath an Advowſon to him and the heires of his body, and for default of ſuch iſſue, the remainder ther-of unto him and his heires; if an uſurpation be had upon him, hee ſhall not have a Writ of right of Advowſon, and recover the Feeſimple: and that appeareth by the booke of 4.E.3.48. by *Wilby*, where ſuch a tenant in tayle brought a writ of right and recovered but an eſtate in taile: but yet ſuch a tenant in tayle may have an Aſſiſe of Darrein preſentment, or a *quare impedit* at his election; and in this writ the Plaintiffe muſt count either of his owne ſeiſin or poſſeſſion of the Advowſon, or of the ſeiſin or poſſeſſion of ſome of his Anceſtours. For if a man purchaſe an Advowſon unto him and his heires, and afterwards, before any preſentment thereunto had by him, a ſtranger doth uſurpe, and his Clarke be inſtituted and inducted; and afterwards the Church doth become void again, there the purchaſor by this uſurpation is put out of poſſe-

21.E.4.1.a.
43.E.3.15.
20.E.4.14.b.
22.E.4.9.a.

poſſeſſion of the Church, and cannot maintain a writ of right of Advowſon, becauſe he cannot therein count either of his owne ſeiſin or poſſeſſion, or of the ſeiſin or poſſeſſion of any of his Anceſtors.

There is alſo ſome difference in the forme and frame of the Writ of right of Advowſon: for it is to be knowne, that there is *Advocatio medietatis Eccleſiæ, & medietas Advocationis Eccleſiæ. Advocatio medietatis Eccleſiæ* is, where there be two Patrons of one Church, one of the one moitie of the Church, and the other of the other moity; and therefore in ſuch caſe, if an uſurpation be had upon any one of them, or if any one of them be diſturbed in his preſentment to his moity, hee ſhall have his writ *de Advocatione medietatis Eccleſiæ*, or *quare impedit preſentare ad medietatem Eccleſiæ*; but *Medietas Advocationis* is where two coparceners be of one Advowſon, and they make compoſition to preſent by turnes, here each of them in truth hath a right but to the moity of the Church, for that both of them have but one Incumbent in the ſame, and there is not two Incumbencies

cies in the Church; and therefore if one of them be to bring a writ of right upon an uſurpation, the writ muſt be *de medietate advocationis Eccleſiæ*: but if any of the ſaid coparceners at her turne be diſturbed in her preſentment, ſhe may bring a *quare impedit* upon ſuch diſturbance, and the writ may be *Quare impedit preſentare ad Eccleſiam*, for that damages are to be recovered onely and principally in the *quare impedit*; and the writ is not grounded upon the right of the Patronage; and yet though the writ be generall *preſentare ad Eccleſiam*, yet muſt the count or Declaration be ſpeciall, according to her title.

C. 5 part 102. in Winſorscaſe

Aſſiſe of Darrein preſentment and *Quare impedit* are writs grounded upon the poſſeſſion, which the Patron upon an uſurpation had upon his owne poſſeſsion or his Anceſtors, or upon a ſpeciall diſturbance, may have and maintaine; and thereby ſhall he recover the preſentment, and remove the Incumbent who is in by wrong, and recover damages. But yet there is a difference betwixt the writs of Aſſiſe de Darrein preſentment, and *quare impedit:*

pedit: for first, where a man may have an Assise de Darrein presentment, there he may have a *quare impedit*, but not è *contra*. Secondly, a man may have a writ of *quare impedit* without alleaging of any presentment in a person certain: but a man cannot have an Assise of Darrein presentment, but therein hee must alleage presentment in a person certaine. Thirdly, a Lessee for yeeres, guardian tenant at will, &c. may have a *quare impedit*, but they cannot have or maintaine an Assise of Darrein presentment. Fourthly, if the husband be seised of an Advowson in the wives right, and a stranger usurpe, the husband may have a *quare impedit* in his owne name without naming the wife in the writ, for that the disturbance is special, which fals in damage to the husband; but he cannot have an assise of Darrein presentment, but the wife must be joyned and named in the writ: in an assise of Darrein presentment, the writ doth suppose, that the defendant doth deforce him of the Advowson; and yet in the Count or Declaration the plaintiff Counts that he or his Ancestors did last present; and the Count, although it seeme

20. E. 3. Darr. presentm. 13. Old N. B. 25.

5. H. 7. 14. per Fairfaix.

50. E. 3. 14. per Holt.

21. E. 4. 2 & 3.

14. H. 4. 12.

50. E. 3. 14.

20 E. 3. Darr. presentm. 13. per Greene.

ſeeme repugnant unto the writ, yet it is not ſo, but is good, and the count ſhall not for the ſeeming varience abate the writ, becauſe there is no other ferme of writ.

39.H.6.38. 43.Aſſ.21. 13 E 3. protection 52. 40.E.3.1. 11.H.6 3. 15.E.3.Conuſans 41. 9.H.7.15. 5.H.7.16. Br.Aide 120.

In theſe writs of Darrein preſentment and *quare impedit*, a protection doth not lye for the defendant, becauſe of the danger of the lapſe; neither ſhall Conuſans of Plees be granted of a *quare impedit*, becauſe the inferiour Court cannot write to the Biſhop to admit the Clarke, neither ſhall a man have aid in a *quare impedit*, for the danger of the lapſe.

C.7 part 26. in Hals caſe. 7.H.4 25.

Every *quare impedit* muſt be brought againſt the Patron, the Ordinary, and the Incumbent; for if it be brought againſt the Ordinary and the Incumbent onely, without naming the Patron in the writ, the writ ſhall abate: but yet it ſtands upon this difference, *viz.* if the inheritance of the Patron in the Patronage be to be deveſted by judgement given in the *quare impedit*, then the Patron ought to be named in the writ; but where the inheritance is not to be deveſted bythe judgement, but a bare preſentment onely to be recovered, there

3.H.4.7. 13 H.8 13. 47.E.3.11.

it

it is not neceſſary that the Patron be alwayes named in the writ.

If A. hath the nomination unto a Church, and a Biſhop the preſentation, and the temporalties of the Biſhop come by the King, and afterwards the King doth preſent without the nomination of A. and his Clarke be inducted: there the *quare impedit* muſt be brought againſt the Biſhop and the incumbent onely, for that the King cannot be a diſturbor, and the writ wil not lye againſt him; but it ſeemeth the Biſhop muſt be named in the writ, for that the incumbent could not come into the poſſeſſion of the Church, but by the admiſſion and inſtitution of the Biſhop, and the Biſhop may be a ſpeciall diſturbor. And as it is good policy upon every preſentation by uſurpation or other diſturbance to bring a *quare impedit* as ſpeedily as may be; ſo likewiſe is it good policy to name the Biſhop in the writ, for then he ſhall not collate for lapſe, if the Church remain void by ſix months, and no preſentment be made: neither ſhall the Metropolitan, if the time be come unto him, collate for the ſame lapſe; for it is a rule, that the Metropolitan

38.H.8.Dy.48
4.E.6.br.410.
19.H.7.53.in Kelloway, acc.
C.Litt.344.
M.3.Iac. in Lancaſter & Lowes caſe.
9.H.6 30. 31.
19.H.6.68.

litan ſhall never collate for lapſe, but when the immediate Ordinary might have collated for lapſe, and hath ſurceaſed his time; and in ſuch caſe the Ordinary cannot collate, becauſe hee is made a party to the writ.

5.H.7.34. The writ of *quare impedit* it is a mixt Action, for ſummons and ſeverance lyeth therein; and although the preſentment may incluſive be recovered thereby, yet the damages are principally reſpected; and therefore, if the husband be ſeiſed of an Advowſon in the right of his wife, if the Church void, and the husband be diſturbed in his preſentment, he may have a *quare impedit* in his owne name, without naming the wife in the writ; for albeit the preſentment be recoverable thereby, yet for the diſturbance, which is a perſonall wrong, damages are to be recovered, which ſhall goe to the husband: and therefore in that caſe a releaſe of all Actions perſonals by the husband is a good barre in a *quare impedit* brought by him.

50.E.3.15.
28.H.6.9.
22.H.6.27.b.
9.H.6.57.

If the Plaintiffe be Nonſuit in his *quare impedit* after appearance, the ſame is a good barre in another *quare impedit*

impedit brought within the ſix moneths, and the defendant upon title made, ſhall have a writ to the Biſhop: ſo it is, if the plaintiffe diſcontinue his ſuit, or if he be made a Knight pendant the writ the ſame ſhall abate the writ: but if the writ abate for the inſufficiency of the forme, or for falſe latin, or miſnoſmer of the plaintiffe or defendant, then the defendant ſhall not have a writ to the Biſhop, but the plaintiffe ſhall haue a new writ per journeys accompts.

33.H.6.1. 22.H.6.44. 36.H.6.14. 24.E.3.25. C.7.part Sir Hugh Portmans caſe. 26.E.3.Q.I. 163. C.6.part in Spencers caſe.

If two tenants in common or coparceners be of an Advowſon or Patronage, and ſuffer an uſurpation, ſo as their right is turned into Action; and they bring a *quare impedit*, and ſix moneths paſſe, and then one of the plaintiffes dye, the writ ſhall not abate, but the ſurvivour ſhall recover, for otherwiſe there would be no remedy for to redreſſe this wrongfull uſurpation: but they muſt joyne in the firſt writ, for if the writ be brought in the name of one of them, the writ ſhall abate: but if a *quare impedit* be brought againſt the Patron, and the Incumbent and pendant the writ the Patron dye, there

14.H.4.12. 10.El.Dy.279 37.H.6.7. 17.E.3 br.665 C.Litt.198. F.N.B.35. 3.H.5.Q.1.71

there the writ ſhall not abate, as it is ſaid in *Hals* caſe. But *quære* of that caſe, for it ſeemeth contrary to 3. El. Dyer. 194. where the caſe was, that the Biſhop of Coventry and Lichfeild was Patron of two Prebends, and granted the prochin avoydance *alterius eorum primo vacantem*, which was confirmed by the Deane and Chapter; the Biſhop dyed, and one of the Prebends voyded, and the ſucceſſour of the Biſhop preſented, and afterwards the grantee brought a *quare impedit* within the ſix moneths; and two yeeres after the iſſue was found for the plaintiffe, and the Biſhop dyed, and yet the plaintiffe had his judgement, and had a writ to the Biſhop to remove the Incumbent preſented by the ſucceſſour of the firſt Biſhop.

C. 6. part Hals caſe.

CHAP.

CHAP. XXIV.

Of the Profits of the Rectorie, viz Oblations, Obventions, Offerings and Tythes. And where suit for Tithes shall be in the Spirituall Court, where in the Temporall Court.

THE Profits and fruits of the Parsonage or Vicarage, belonging unto the Parson or Vicar, besides his Glebe Lands, of which we have before spoken, doe chiefely consist in Oblations, Obventions, Offerings and Tithes; of Oblations, Obventions and Offerings, being meere spirituall things, and not much touched upon in the Bookes of our Law, I will forbeare to speake of at this time, and say somewhat of the last, *viz.* Tithes, of which there is somewhat more said in the Books and Records of our Law.

Tithes are an Ecclesiasticall Inheritance, collaterall to the estate of the Lands to take the tenth part of the profits of the Lands, due onely to an Ecclesiasticall person, and recoverable C.11.par.13.b in Prielle and Nappers case.

7.E.6.Dye.84. 31. Eliz. in Com. B. Parkins caſe adjuge, &c.

onely originally in the Eccleſiaſticall Court. They are not extinguiſhed by a feoſment made of the Lands: by the demiſe of the Lands with all profits belonging unto or out of the ſame, they will not paſſe; they are not iſſuing out of Land or Rent is, nor can they be extinct by unity of poſſeſſion, unleſſe it be by a perpetuall unity, as hereafter ſhall be ſhewed; all which prove them to be collaterall to the eſtate of the Lands.

C.2.part 44. 10.H.7.18. 44.E.3.5.per Ludlowe. 7.E.3.5. per Parne. Bede li.1.c.28

In ancient time, before the Councell of Lateran, every man might have given his Tithes to what Church he pleaſed, and have beſtowed them upon what Parſon or Vicar he thought beſt: or the Biſhop of every Dioceſſe might have made diſtribution of them within his owne Dioceſſe: but by a Canon made in the ſaid Councell, every man is ſince compellable to pay or give his Tithes unto the Parſon or Vicar of that Pariſh where they are growing or ariſing. Now although before the ſaid Councell, the parties might have granted them at their owne liberties, or they might have bin diſtributed, as aforeſaid. And by the ſaid Canon they are now

reſtrained

restrained to give or pay them unto the Parson or Vicar of that Parish where the tithes arise: yet did not that Canon make them to be more Ecclesiasticall then they were before: but the jurisdiction of tithes, as well before the said Canon, as since, did *de jure* belong unto the Ecclesiasticall Court; for neither Assise nor Precipe, did lye of tythes or any other Ecclesiasticall dutie at the Common Law; and therefore although we finde in some books and Records of our Law, that suites for tithes have bin prosecuted in Courts of Lords of Mannors, and in the Kings temporall Courts, yet the said suits were not for them as tithes meerely, but as Lay profits apprender, and not Ecclesiasticall duties. And therefore where it appeareth in the Booke of 44.E.3.5. that an Assise was brought of tithes; it is to be observed, that the Assise there brought was of the tenth of all manner of corne and graine, after the tithes of the Parson taken, which was but a Lay profit apprender, and no Ecclesiasticall dutie. 44.E.3.5.

If Tithes doe lye in any Forrest, as the Forrest of Windsor, Rockingham,

or Sherwood, which is out of any Parish; the King shall have them by his Prerogative, and not the Bishop of the Diocesse, or the Metropolitan of the Province, as some have thought. But yet it seemeth by the Booke of 22. Ass. 75, that if there be cause of suit for such tithes against the parties, who ought to pay the same, the suit must be brought in the Ecclesiasticall Court: but if a stranger take away such tithes there, for such trespasse, the suit may be in the Temporall Court, as the same may be for the taking away of other goods in the like case.

16. E. 3. Q. I. 147.

In 16. E. 3. Q. I. 147. the King brought a *Precipe quod reddat* of the fourth part of the Tithes and Offerings of the Church of Saint Dunstons in the West, against a Prior; and it was ruled, that the writ did lye: but it is to be noted, that the writ was not brought (as I conceive) against the Prior as a Parishioner who ought to pay the tithes, but against him as Prior, for taking the Tithes against right; so as the suit was not originally for the tithes as tithes, but for the tortious taking of them: for tithes set forth are become *Lex*, Chattels,

tels, for which the King had his remedy at the Common Law, if they were with-holden from him.

In 38.E.3.20. A Prior Alien Farmer of the King, was indebted unto the King for his Farme, and being sued for the same in the Exchequer, hee shewed unto the Court, that there was a Parson, who held a portion of tithes which was parcell of the possession belonging unto his Farme, and that the Parson withheld the tithes from him; by reason whereof hee could not pay the King his farme without having of those tithes which were in the Parsons hands: and upon this a *Quo minus* issued out of the Court of Exchequer at the suit of the Prior and the King, for the paiment of those tithes unto the King: and there it is said by *Skipwith*, that of that which concerneth the King and may turne to his advantage, and hasten his businesse whether the same be Spirituall or Temporall, the Court of Exchequer shall have jurisdiction: but note, that that was by the Kings prerogative; for it was there agreed, that such suit for tithes doth not fall into the jurisdiction of the Kings Bench, 38.E.3.20.

Vide 44.E.3. 43.44.Le Prior de Ekebornscase, &c.

or the Common Pleas; for that the right of tithes is determinable onely in the Eccleſiaſticall Court.

All tithes then being Eccleſiaſticall things, and recoverably onely in the Eccleſiaſticall Court; let us ſee how far the Statute of 32. H. 8. cap. 7. hath altered the Law in this point. After the Statutes of 27. H. 8. & 31. H. 8. of Diſſolution of Monaſteries; by which Acts of Parliament many Advowſons, Parſonages, Vicarages, pencions, portions and tithes came unto the Crowne, and were afterwards by conveyance or otherwiſe transferred and granted over unto Lay perſons, who were not capable of tithes by the Common Law, the Statute of 32. H. 8. cap. 9. was made, by which Statute it is enacted, that if any perſon which ſhould have any eſtate of Inheritance or Freehold, terme right or intereſt in any Parſonage, Vicarage, pention, portion, tithes, oblations, or other Eccleſiaſticall or Spirituall profits, then made temporall, and which ſhould be ſuffered to goe into lay-mens hands, ſhould be diſſeiſed, wronged, or kept out of their lawfull inheritance, right or intereſt to the ſame,

ſame, that the perſons ſo diſſeiſed or wrongfully kept out of their rights or poſſeſſions, their heires, &c. ſhould have remedy in the Kings temporall Courts for the recovery of their rights and poſſeſſions, by writs of *Precipe quod reddat*, Aſſiſe of Novell diſſeiſin, writs of Dower, or other writs, as the caſe ſhall require.

This Statute for theſe tithes, oblations, and other ſpirituall profits made Ley Fees in temporall mens hands, as aforeſaid, gave remedy in the Kings temporall Courts: yet did not this Statute take away the force of the Eccleſiaſticall Law concerning tithes; but for not ſetting forth of tithes, or for refuſing to pay the ſame. All Eccleſiaſticall perſons who had right before the ſaid Statute to have Tithes, or Oblations, might demand or ſue for the ſame in the Eccleſiaſticall Court. So as this Statute was an addition unto the Law, in reſpect of the lay fees onely, and no alteration or diminution of that power that the Eccleſiaſticall perſon had for his tithes in the Spirituall Court, before the Statute. And upon this Law, as I conceive, was the Caſe of 7. E. 6. Dyer

83. grounded, where an Assise was brought *de libero tenemento de quadam portione decimarum.* And the case of *Pasche* 5. *Iacobi in Com B.* the Countesse of Oxfords case, where a writ of Dower was brought of prediall tithes; for that I have not found nor read in any booke of the Common Law, that a woman was dowable of tithes; or that any Assise or precipe did lye of them as Ecclesiasticall duties; for that it is said in C. 11. part 13. in *Prisdle* and *Nappers* case, that a lay man could not have an inheritance in tithes at the Common Law; nether did they passe betwixt party and party, as other temporall Inheritances did. But now (as I said before) tithes and other Ecclesiastical duties that came to the Crown by the said Statutes, are by those Statutes in the hands of lay men temporall inheritances, and shall be accounted Assets, and husbands shall be tenants by the curtesie of England, and wives endowed of them, and have other incidents belonging to temporal inheritances. This onely Ecclesiasticall quality they still have and retaine, that the owner or proprietor thereof, may sue in the Ecclesiasti-

call

call Court, for the ſubſtraction of them if he pleaſe,

In the nineteenth yeere of the reign of Queene *Elizabeth*, in the Kings Bench, it was diſputed, whether tithes were due *de jure divino*, or by the conſtitution onely of Man; and it ſeemed unto the Iudges, that they were due as well by the conſtitution of Kings, as by the Law of God. This agreeth with the Diſcourſe of the Student in Doctor and Student 166. If it were diſputed *de quota parte*, what part was due for the Student holdeth, that the tenth part was due only by mans law; and to confirme his opinion hee citeth *Gerſon* the Divine, in his treatiſe entituled *Regulæ morales*, where he ſaith, *Solutio decimarum ſacerdotibus eſt de jure divino quatenus inde ſuſtententur, ſed quoad tam hanc quam illam partem aſſignare, aut in alios reditus commutare Poſitivi juris eſt.* And in another place, where he ſaith, *Non vocatur portio Curatis debita propterea Decima, eo quod ſemper ſit decima pars, imò eſt interdum viceſima aut triceſima.* But that tithes were due *ex jure divino*, there was never any queſtion or doubt, but *de quota parte* there hath bin 19. Eli. in B.R.

some question; and although we finde in F. N. Brevium 30. that before the Statute of 18.E.3. rights of tithes were sometimes diverted in temporall Courts (whereof before I have delivered my conceit) yet did not that make them not to be spirituall (as before is said) for we see that the Probate of Wils and Testaments did belong unto Lords in the Courts of their Mannors, and did appertain unto the spirituall Courts but of later times, and belonged unto Ordinaries, *ex consuetudine Angliæ & non de communi jure*: yet it is not to be thought or doubted, but that Wils and Testaments, and Legacies therein contained, were ever esteemed Ecclesiasticall, and to appertaine to the Ecclesiasticall jurisdiction. But Tithes were as I conceive in themselues (*quatenus decimæ*) spirituall and due *ex jure divino*, and were not accounted as temporall inheritances; for they could not be appendant or appertenant to Mannors or Lands: nor were they such things out of which Rents and services could be reserved, nor were they transferable as other Temporall Inheritances were; and yet they might have bin

C. 9. part Hensloes case. 11.H.7.12. Limrood L.5. de Test.24.

given

given in exchange for other temporall inheritances; for in exchanges it is not requiſite, the things exchanged be of one nature or qualitie; and therefore the exchange of tithes for annuitie or rent was good in 9.E.4.21. in the Prior of Sempringhanis caſe: but there it is to be noted, that the ſame was betwixt religious and Eccleſiaſtical perſons, and not betwixt lay men; for before the Statute of 32. H. 8. cap. 7. Lay men were no way capable of tithes in pervancy, as before is ſaid. 9.E.4.21.

If a Parſon make a leaſe for yeeres of his Parſonage, rendring a rent for all manner of demands, as well Eccleſiaſticall as Temporall, yet the leaſee ſhall pay tithes to the Parſon, for that they are due *de jure divino*, and cannot be included in rent. 32.Eli. adjuge Parſon Babbingtons caſe. 33.H.8.Dy.45 44.E3.13. per Kirton.

If tithes be ſevered and ſet forth, and afterwards the Parſon leaſe out the Parſonage, without mentioning of the tithes, the tithes ſet forth ſhall paſſe; for although they be divided and ſevered, they are as yet ſpirituall duties of the Parſonage. But if the tithes be carried into the Barne, and afterwards the Parſon leaſe out his Parſonage with all M.6.Iac. in Com. B. Smiths caſe.

pro-

profits, &c. thoſe tithes ſhall not paſſe to the Leſſee, for now they are become lay chattels.

19.H.8.12. 21.H.7.21. 9.E.4.47.

If a Parſon doe demiſe his Rectory for yeeres, the tithes will paſſe *inclusive*, although the Leaſe be by parol onely: but if the Parſon leaſe out his tithes alone, they will not paſſe unleſſe the ſame be by Deed of writing. But that ſtands alſo upon a difference; for the Parſon may demiſe his tithes to the ownor of the ſoyle for one yeere by word onely, as it was agreed by all the Iudges, M. 2. Car. Rott. 179. in the Kings Bench in *Bellamy* and *Bobthorps* caſe. But hee cannot demiſe them to a ſtranger, but the ſame muſt be by writing: and although tithes will paſſe unto the ownor of the ſoyle by contract, as before is ſaid; yet may the Parſon ſue the ownor for the tithes in the ſpirituall Court; and the ownor, by reaſon of ſuch contract, ſhall not haue a Prohibition; but then the ownor may ſue the Parſon upon the contract in the temporall Court, and recover as much in damages; but then in his pleadings hee muſt not declare of a verball contract, but muſt ſet

M.8.Iac. in Com. B. Crofts caſe. P.16.Iac.inB. R.Barnewell & Pulſes caſe, adjug. acc.

set forth the same to have bin made in writing.

Chap. XXV.

What persons were capable of tithes by the Common Law. Of what things tithes shall be paid; what shall be a good composition or modus paid for tithes. How farre the same shall binde the Incumbent or his Successours. And of divers other things concerning the paiment of tithes.

BY that which hath bin said, it appeareth that by the Common Law a meere Lay person was not capable of tithes, nor could any Lay man sue for the same in the Ecclesiasticall Court, but onely spirituall and Ecclesiasticall persons.

In 2.R.2. jurisdiction 37. in an action of Trespasse, the Defendant justified for tithes, in the right of his Master, and pleaded to the jurisdiction of the Court, 2.R.2.Jurisdiction 37.

Court, and he was forced to anſwer unto the Action there, for that the Plaintiffe could not have his remedy in the ſpirituall Court againſt the Defendant for the ſaid tithes; nor could the Defendant ſue the Plaintiffe in the ſpirituall Court for the ſame, but Prohibition would lye in the caſe, for that hee was a perſon not able to ſue for tithes there, being a lay man; and the right of tithes was not triable in the ſpirituall Court, but betwixt ſpirituall perſons. So in an Action of Treſpaſſe brought by a Vicar for taking of his goods; the Defendant pleaded, that I. S. was Parſon of the ſame Church, and that the goods were tithes ſevered, and that he as ſervant tooke them; the Plaintiffe replied, that he was Vicar of the ſame Church, and that he and his Predeceſſors had uſed to have the tithes as belonging to the Vicarage; and traverſed; that they were the goods of the Parſon, the Defendant demanded the juriſdiction, for that the right of tithes would in that Action be tyed betwixt them, and *per Curiam*, the Court ſhall not be ouſted of the juriſdiction, becauſe the Plaintiffe could not have his

6. E. 4. 3.

his Action againſt the Defendant in the Spirituall Court; nor the Defendant againſt him there, for that they were not both ſpirituall perſons, betwixt whom the right of the tithes could be tried in the Spirituall Court. But in all Actions, if it appeare by the plea in Barre of the Defendant, or by the Plaintiffes Replication, that the right of the tithes doth come in debate; if the Parſons be of ability to ſue, there the temporall Court ſhall be ouſted of the juriſdiction. By which Caſes it appeareth, that by the Common Law, no perſon was capable of tithes but a ſpirituall perſon; nor could any man ſue for the ſame in the Eccleſiaſticall Court, except hee were an Eccleſiaſticall perſon, betwixt which perſons the right of tithes was there onely triable. But yet at the Common Law, the King being *perſona mixta cum ſacerdote* as it is ſaid in 10.H.7. was capable of tithes, and his Patentee alſo by his prerogative, as appeareth by the Caſe of 22. Aſſ. 75. before cited: where the King having tithes in the Forreſt of *Rockingham*, did by his Letters Patents grant the ſame unto the Provoſt of C. who thereupon brought

33.H 6.per Forteſcue.
5.H.6.39.
14.H.4.17.4.

a Scire facias against the Occupiers of the Lands within the Forrest, to have execution of those tithes, and the writ allowed, although execution was afterwards stayed for some other cause, and the cause perhaps might be for that the Provost was not an Eccleſiaſticall person (for there were many lay Provosts) *ideo quære* the case and the Record thereof.

Now although a meere lay man was not capable of tithes by the Common Law inpervancy, and as to say for the same in the Eccleſiaſticall Court; yet by the common law a lay man was capable of a discharge of tithes, and that two wayes: first, by grant of the Parson or Vicar: secondly, by compoſition: for although a meere lay man could not nor can at this present day prescribe in *non decimando* as it is said in C. 2. part. the Bishop of Winchesters case, and in 8. E. 4. 14. by *Coke*, yet may he prescribe in *modo decimandi*, to pay a compoſition to the Parson or Vicar in lieu of all his tithes; and such a modus shall binde the Parson or Vicar: and although they in the spirituall Court will not allow of any plea in discharge of tithes in their

Court

Court, as it is said in 8 E.4.14.by all the Serjeants, and in Doctor and Student 177. yet upon a surmise and suggestion of a *Modus Decimandi* in the Kings temporall Courts a Prohibition shall be awarded unto the spirituall Court, to stay their proceedings there until the *Modus Decimandi* be tried in the Kings temporall Courts.

38. E.3.grants 84

In 38.E.3. gr.84. a Prior imprisoned did grant unto I. S. that he should not pay tithe of the corne and graine growing upon such lands, and the grant was holden good, and did binde the Prior. So in 38.E.3. jurisdiction 44. the Prior of R. brought an action against the Abbot of S. and his cofreers, for taking of his corne; the Defendants pleaded, that the Prior was Parson of the towne where the corne grew, and that their lands were not titheable by reason of a composition made betwixt them and the Prior, for the tithe of their lands. And it was adjudged, that if the action be brought for the tithes of the lands, that the composition pleaded in barre will be a good barre to the action. And it appeareth by the Register, that a man may be discharged from the paiment of

38.E.3. Juris. 44.

tithes by compoſition made with the Parſon or Vicar; and it is uſuall, as by many Caſes after ſhall appeare.

Now although it be agreed, that a meere lay-man cannot preſcribe in *non decimando*, not to pay any tithe at all; for that ſuch preſcription would be againſt the Law of God, tithes being due *ex jure divino*: yet the opinion of the Student in his Diſcourſe of tithes, is, that a Countrie may preſcribe to be quit of the tithe of corn & graſſe, ſo as the Vicars or Curates have ſufficient portions beſides to live upon. But if one man in a towne would preſcribe to be diſcharged of tithes of corne and graſſe, ſuch preſcription would be altogether void, unleſſe he did ſhew he did recompence the Parſon or Vicar ſome other way. But one man in a town may preſcribe to pay a modus, or a certaine penſion unto the Parſon or Vicar in lieu and contentation of all his tithes; and ſuch a preſcription hath bin adjudged good.

Doct. & Student. 167.

40. Eliz. in Piggot & Hernes caſe.

A ſpirituall perſon may preſcribe not only in *modo decimandi*, but alſo in *non decimando*; not to pay any tithes at all: and lands may be diſcharged from the paiment

ment of tithes in the hands of ſpirituall perſons; and now ſince the Statute of 31. H. 8. in the hands of the Kings Patentees by preſcription, priviledge or unitie.

The Biſhop of Wincheſter preſcribed, that hee and all his predeceſſours there, farmers and tenants had holden a Mannor and the demeanes thereof, exonerated, acquitted, and diſcharged of and from the paiment of tithes; and the preſcription was adjudged good; and that the ſame was good as well for his tenants as for himſelfe.

If a Parſon purchaſe a Mannor or Lands in a Pariſh, whereof hee is the Parſon; the tithes of this Mannor or Lands are ſuſpended, whil ſt the Mannor lands or Parſonage remaine in his owne hands, becauſe hee cannot pay tithes unto himſelfe. But if afterwards he make a feofment in fee of the Mannor or Lands, or leaſe them out for yeers unto another: there the Purchaſour or Leſſee ſhal pay tithes to the Parſon; and he ſhall have the tithe of the Lands againſt his owne Feofment or Leaſe; for that tithes being due *ex jure divino*, muſt bee paid unto whom ſoever the 30. H. 8. Dy. 43. a.

Lands come, unleſſe they come to the Parſon or Vicar himſelfe, or unleſſe the perſon to whom the ſame are come can be diſcharged from the paiment of tithes, by reaſon of ſome ſpeciall priviledge.

An Abbot and his Covent, or a Prior and his Covent might have bin diſcharged from the paiment of tiehes. But if all the Monkes had dyed, and the Abbot or Prior alſo, ſo as there had bin a Diſſolution in Law of the Abby or Priory, if the Lands had come to other perſons, the occupiers or owners of thoſe Lands ſhould have paid tithes, as it was adjudged *Mich.* 11 *Iacob. in Com. B.* in the Deane and Chapter of Winſor and *Webs* caſe.

15. Eliz. in Harpets Reports.

The Ciſtercians, Templers, and Hoſpitilers of Saint *Johns* of Ieruſalem, by their Orders were to defend Chriſtians againſt the Infidels; and had a priviledge granted unto them by the Pope in the Councell of Lateran, 15. *Iohan. nidecimas prædiorum ſuorum quæ in manibus ſuis p. opriis excolunt non tenentur ſolvere* This was but a ſpeciall priviledge for the Lands in their owne manurance, for the maintainance of Hoſpitality

pitality, and had many Reſtrictions. Firſt it extended onely to ſuch Lands as they had at the time of the Councell, and for ſo long time onely as the ſame remained in their owne poſſeſſions. But if Lands had bin purchaſed by them after the ſaid Councell, the priviledge had not extended to ſuch Lands, for that it was but a ſpeciall priviledge, and therefore was to be taken ſtrictly. The Abby of Fountaines was of the Order of Ciſtercians: and 11. *Iohan* before the Councell gave Lands to one *Kirbye* to hold of them by Fealty, &c. and afterwards in 36. E. 3. thoſe Lands did eſcheate unto the Abby: it was reſolved in his caſe in the Court of Common Plees, in Sir *Robert Dickinſons* caſe, that for the Lands eſcheated tithes ſhould be paid; for that the eſcheat was in the nature of a new purchaſe, and the immunity did no extend to ſuch Lands; like unto the caſe of 29. E. 3. *Fitz. Quinzim* 1. where Lands are holden of an Abby, and diſcharged from the paiment of Quinzim: and after the ſame Lands come unto the Abby again by Eſcheate, the Abby ſhall pay Quinzim for thoſe Lands. And that the Lands

which those religious houses purchased after the said Councell, or which afterwards escheated unto them were not priviledged, appeareth by the Statute of 2.H.4.cap14. whereby it was enacted, that the religious houses of the Order of the Cisterians, which had purchased Buls to be discharged of tithes, should be in the state they were before, and that against those that tooke advantage of them processe of premunire should be awarded. By which Statute it appeareth, that they intended to have discharged the lands, which came to them after the Councell; but that the Lawes of the Realme would not allow of such Buls for discharge, nor extend the priviledge unto other Lands then what they had in their owne manurance at the time of the said Councell. Secondly, the priviledge was but speciall for the lands in their owne manurance or occupation; for if they had leased out their lands to Farmers for rent, if it had bin for yeeres or but at will, yet the Farmers or occupiers of those lands should have paid tithes; for by such lease the Lessours had admitted the occupation of the lands to have bin

18.Eliz.Dy. 349
C.2.part.44.

10.Iac. in Co. B. Iaggard & Huttons case.
3.H.8 Kell. 163.

in

in the Lessees; for upon such possession the Lessees might have maintained actions of trespasse. Thirdly, the priviledge was speciall, and did not extend to new erections upon the lands priviledged: and whereas by the Law and ancient Constitutions of the Church, of ancient Mils tithes were not paid; but by the Statute of *Articuli Cleri, cap.* 5. for Mils newly erected, tithes were to be paid; it was adjudged *Trinit.* 14. *Jac.* that where a Parson did libell in the spirituall Court for the tithes of a Mill which was erected upon lands priviledged from the paiment of tithes, by force of a priviledge within the Statute of 31. H. 8. that a Prohibition would lye in the case, for *de novo molendino erecto* tithes shall be paid.

Vnity of possession of the Parsonage and lands, which should pay tithes by an appropriation, or otherwise in the hands of religious and Ecclesiasticall persons, had discharged them from the paiment of tithes. And now at this day by the Statute of 31. H. 8. cap. 13. such an unitie of possession in the said religious houses and persons shall be a discharge for the Kings Patentees from

the paiment of tithes for lands that came to the Crowne by the said Statute, but then such an unity in the said religious and Ecclesiasticall persons must have bin *justa aequalis, libera, perpetua*; as it is said in *C. 11. part* in *Priddle* and *Nappers* case. It must have bin *justa*, obtained by right; for if either the Parsonage, Vicarage, tithes or lands had come or bin united unto their houses by Disseisins, or other tortions and unlawfull acts, such an unity had not bin a good discharge within the Statute. Secondly, it must have bin *aequalis*; there must have bin a Feesimple both in the lands out of which the tithes were to be paid, and in the Parsonage or Vicarage in them; for if the Abbots, Priors, or other religious persons had held but by Lease, that had not bin such an unity as the Statute intended. Thirdly, it must have bin *libera*, free from the paiment of any tithes; for if their Farm or tenants at will, or yeeres, had paid tithes, that had not bin a sufficient unity to have discharged them from the paiment of tithes. And lastly, it must have bin *perpetua* time out of minde; and then for the infinite impossibility,

and

and impossible infiniteneſſe, that ſuch immunities and diſcharges, that ſuch religious perſons and houſes had before time of memory, could not be known: ſuch an unity had bin a good diſcharge of the lands in their owne hands; and at this day ſuch an unity is a good diſcharge for the Kings Patentees within the Statute of 31. H. 8. But ſuch lands as came unto the Crowne by the Statute of 27. H. 8. of Diſſolution, ſhall at this day pay tithes, although the lands in the hands or occupation of the ſaid religious perſons or houſes were diſcharged from the paiment of tithes; for that the priviledges being perſonall priviledges, were extinguiſhed by the ſaid Statute of Diſſolution: and there are no words in the ſaid Statute of 27. H. 8. to ſave the priviledges unto them: and the Statute of 31. H. 8. being a ſubſequent Law, had no retroſpect to thoſe priviledges; and ſo hath it bin adjudged in all the Courts at Weſtminſter, by all the Iudges of England, *viz.* 15. *Iac. in Com. B.* in *Gerret* and *Wrights* caſe, and 7. *Car.* in the Court of Exchequer in *Clarke* and *Wards* caſe.

Tithes then being meere ſpirituall

things,

things *aborigine*, due *ex jure divino*, recoverable onely in the spirituall Court, and payable by all persons, unlesse discharged by prescription, suspension, priviledge or unity. Let us see of what things tithes shall be paid, and of what not; and what shall be a sufficient composition or modus paid in lieu of tithes, and how long and how farre such composition or modus shall binde the present incumbent for the tithes.

All tithes are Prediall, personall, or mixt. Prediall tithes are such as doe increase yeerely of the ground, such as corne, graine, grasse, Hops, Saffron, Woad, Hempe, Flaxe, and other profits arising meerely of the ground. Personall tithes are those that are paid of the profits of such things as are gained by the industry of man. Mixt tithes are those which are called Prediall mediates, such as Calves, Lambs, &c. which come not immediately of the ground, but proceed of such things as are maintained out of the ground. Of all these sorts tithes shal be paid, but with this limitation or proviso, that the party who is to pay the tithe of them have property in them; for of things which are *feræ naturæ*,

nature, and of which a man hath not the absolute property; or of things which are meerely for pleasure, tithes shall not be paid; and therfore of Apes, Hounds, Thrushes, Popingayes, &c. tithes shall not be paid.

Tithes shall be paid of Phesants and Partridges; but they are not prediall, but personall; so is it of Conies taken in a Warren, and of Doves in a Dove-house, they are not prediall, for they cannot be set forth. A Faulkner who hawks for his pleasure shall not pay tithe of the fowle hee takes. But if a Fowler kill fowle and make sale and profit of them, he shall pay a personall tithe for them.

If a man steale Conies out of a Warren, or Doves out of a Dovehouse, hee shall not pay tithe of them, because he is not lawfull owner of them, and the Law giveth him no property in them; and the rightfull owner shall not pay tithe for them, because he hath not the profit of them.

If Cattle be pawned or pledged, the gagee shall pay tithe for them, because he is lawfull owner of them for the time; but if a man baile goods for to

rebaile,

rebaile, tithe for them shall not be paid by the bayler, because he hath no property in them, but onely a rebailer.

Register 51. F.N.B.53.g. Br. Dismes 18. Tithes shall not be paid of quarries of Stone, Tyle, Bricke, Lyme, Gravell, Chalke, &c. for these are parcell of the Inheritance, and the Parson or Vicar hath the tithe of the Grasse and Corne growing upon the same lands, and the land shall not pay a double tithe.

M.6.Jac.in Coi.B. Smiths case. So tithe shal not be paid of afterpasture where tithe hath bin paid before of the grasse of the same ground, unlesse by covin there be left more grasse standing upon the ground then there hath bin wont to be left: and so it is of the rakings of corne and graine: for by the lawe of *Moses* none ought to rake the grattens, but ought for to leave the same for the poore and orphans; and the law will not give unto the Parson or Vicar tithe of that which is appointed for almes.

P.7.Jac.in Coi.B. adjuge &c. If lands lye fallow every second or

P.7.Jac.in coi. b.adjuge &c. third yeare: the same is a charge to the owner or tenant for that yeare, and an advantage to the Parson or Vicar in the bettering of his crop the yeere following, when the land is sowed with corn

or

or graine; and therefore although the graſſe and feeding of the fallow ground for that yeere be ſome ſmal profit to the owner of the ſoyle, yet he ſhall not pay tithe for the ſame; & therefore if barren cattle be kept upon the fallow or upon the ſtubble, no tithe is to be paid for the.

Tithe ſhal not be paid for beaſts of the plough or husbandry; but if a man keep cattle untill they be ready for the payle, and after ſell them, and doe make profit of them, tithe ſhall be paid for them. M.8.Jac.in Coi.B. Baxter & Hopers caſe adjuge.

If a man leaſe out his paſture lands, reſerving the paſture for a horſe for himſelfe to ride upon about his affaires or husbandry, tithe ſhall not be paid for the paſture of the horſe; but if a man keepe and breed horſe in his paſtures to ſell them, there a tithe ſhall be paid for the horſes paſture. H.15 Jac.in B.Hide & Elys caſe.

If underwood be cut and imployed for the fencing of the corn or paſtures, the Parſon or Vicar ſhall not have tithe of it. And if there be Parſon and Vicar in one Church, and the Vicar hath tithe wood, and the Parſon the tithe of the paſture grounds; and wood be felled and imployed in fencing and incloſing of the paſture grounds, the Vicar ſhall

shall not have tithe of the same wood.

M. 15. Iac. in Co. B. White & Bickerstaffs case adjuge.

If wood be cut downe and imployed for hoppoles, where the Parson or Vicar have tithe Hoppes, hee shall not have tithe of the hoppoles. So if a man have a great family, and much wood be felled and spent in house keeping, tithe shall not be paid of such wood, by *Hobart* chiefe Iustice.

Fitzherbert in his *F. N. Brevium*, 53. is, that no tithe shall be paid for Agistment of Cattle: but I conceive the Law to be otherwise, and that tithe shall be paid for Agistment, and that by the owner of the Lands and not by the owners of the cattle: and the reason is, for that the Parson or Vicar may not certainly know whose the cattle are, and therefore the best shall be taken for the Church, and that which is most certaine: and therefore the tithe for them shall be paid by the owner of the soyle where the agistment is, and who tooke the cattle to agistment: and so was it agreed by *Cooke* and *Foster* Iustices, in the argument of *Baxter* and *Hopes* case, *8. Iac. in Com. B.*

If Sheepe after they be shorne dye before

before the feaſt of Eaſter next following, tithe ſhall not be paid of the wooll of thoſe ſheepe: Firſt, becauſe the ſame is but of ſmall or no value, *& de minimis non curat lex.* Secondly, becauſe the owner of the ſheepe hath paid tithe wooll the ſame yeere, and there ſhall not be a double tithe paid of one thing in one yeere, as before is ſaid. Thirdly, tithe ſhall be paid of the cleere profit onely; but if the ſheepe dye before the feaſt of Eaſter, all the profit of the wool is loſt. And therefore for to demand tithes of them were but *afflictionem addere afflicto.* And tithes ſhall not be paid of the pelts or fels of ſheepe which dye of the rot without a ſpeciall cuſtome, for ſo was it adjudged *Trin. 3. Car.* in the Kings Bench in a Prohibition betwixt *Aſton* and *Miller* Vicar of Kilmouſden in the County of Somerſet: where the Vicar libelled in the Spirituall Court, for the tithe of wooll of ſheepe which dyed of the rot, and a Prohibition was awarded: but *quare* of the firſt of theſe caſes. For by *Fitzherbert* in his *Natura Brevium*, Conſultation 51. 1. The Parſon by preſcription may claime tithe of wooll of the

the sheepe of the parishioners killed or dying, from Mich. to the feast of Easter, and may sue for the same in the Ecclesiasticall Court; and shall have a Consultation, if a Prohibition be awarded upon the matter showne, *saeo quere.*

M. 11. Jac. in Coi. B. Sharingtons case.

If ground be barren *sagita natura*, tithe shall not be paid of it; but of underwoods which are digged up by the roots, or of hedgerows tithes shall not be paid; and if ground be barren, and tithe lambe and wooll hath bin paid off of the same for thirty yeeres together, and afterwards by the manurance and labour of man the same is made fertile, and doth bear corne or graine, the owner of the land for 7. yeers shal pay but such tithe for the same as he paid before.

2. Eliz. Dy. 170.

Tithes shall be paid of heath, furres, and broome, unlesse the party set forth a prescription or speciall custome, that time out of minde there hath bin paid, milke, calues, &c. of the cattle that have bin kept upon the same lands; for then they shal not pay tithe of the heath furs or broome.

M 29. Eliz. in b. r. adjuge ac

Of trees of the age of twenty yeeres grouth or above, which are timber trees tithes shal not be paid: but of *Silva Ce-*

11. H. 4. 89. 50. E. 3. 10.

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dua and under woods, tithes ſhall be paid, but not of great trees by the Statute of 45.E.3.cap.3.

Now what ſhal be ſaid to be *Silva Cedua*, and what timber trees there hath bin queſtion, both by Canon and Common Lawyers. *Linwood lib.5.fol.26.a. Decima de ſilvis Ceduis ut de frumento perſolv. circa qua minus quam circa fructus agrorum laboris myſonitur. Et idem declaramus proviſione Concilii Silvam Cedram illam ſore qua cujuſcunque generis exiſtens arborum in hoc habetur ut cedatur; & qua etiam ſucciſa ex ſtipitibus & radicibus renaſcitur.* And *Belknapp* 50.*E.*3.10. in *ſilva Cedua* is included all manner of wood which is to be cut, and which by good husbandry and keeping may grow againe.

The miſinterpretation of theſe words (*Silva Cedua*) gave occaſion unto Parſons and Vicars in the time of King E.3. to ſue for tithe of great trees and timber trees, under the name of *Silva Cedua*. For the Declaration of which, the Statute of 45.E.3.cap.3. was made, by which it is ſaid, Whereas the great men and Commons ſell their great woods at the age of twenty yeeres, or of greater

age to Merchants to their owne profits, or in aide of the King in his wars, Parſons and Vicars do implead them in the Spirituall Court for tithe of the ſaid wood, by the name of *Silva Cedua:* it is ordained that a Prohibition in this caſe ſhall be granted, as hath bin uſed before this time.

Now 50.E.3.10 by *Belknapp*: it was never ſeene, ſaith he, that of great trees or of timber trees, tithes were demanded, which the Court agreed. And by *Cooke* 11.*part* 48. in *Liſords* caſe, the words of the Statute of 45.E.3. and the booke of 50.E.3. (great trees) muſt be intended Oake, Aſh, and Elme, of all which, as well before the Statute of 45.E.3 by the Common Law, as ſince, if they were of the age of twenty yeers growth, tithe was not to be paid; becauſe they of their natures were onely accounted timber trees, and fit for building. But of Sallowes, Willowes, Maples, and the like, although they be above twenty yeers growth, yet of them tithes ſhall be paid.

Com. 470. in Soby & Molins caſe. Doctor & Student. 169.C. 11.par. Liſords caſe ac.

It hath bin a queſtion whether great Beeches are timber trees, and whether tithe ſhall be paid of them: but the better

ter opinion hath bin, that they are not timber, and that tithe ſhall be paid of them, except where by cuſtome of the Countrey, where there is great ſcarcity of wood, they be accounted timber trees, for there no tithe ſhall be paid of them. 16. Jac. in Co. B. Pinder & Spencers caſe, adjuge.

If a great wood doth conſiſt for the moſt part of underwood, which are titheable, and ſome great trees or beeches *ſparſim* grow therein, tithe ſhall be paid of the whole wood, unleſſe they be ſpecially excepted. And ſo if a wood doe conſiſt for the moſt part of timber trees, and there is ſome ſmall parcell of underwood, or buſhes growing in the ſame wood, the priviledge of the great wood and timber trees ſhall priviledge the reſidue of the underwood from tithe to be paid thereof. T. 19 Jac. in B. H. adjuge. ac. 16. Jac. in Co. B. Leonards caſe vouch. per Juſtice Warberton.

If timber trees have bin uſually topt and lopt, tithe ſhall not be paid of the tops and loppings: for the Law that priviledgeth the body of the tree, doth priviledge the branches of the ſame tree: ſo if a timber tree become *arrida ſicca, nec portans fructus, nec folia in eſtate, nec exiſtens maremium*; yet becauſe ſometimes it was an inheritance which was C. 11. part 48. in Liſords caſe.

diſcharged of tithes, although it be now dottard tithe ſhall not be paid of the ſame, for the quality remaineth although the ſtate of the tree be changed.

Tithes generally and originally are not payable of houſes of habitation nor of any rent reſerved upon any demiſe of them; for tithes are to be paid of things which grow, or renew every yeere by the act of God. And for the houſes in London, tithes anciently were not paid; for the profits of the Churches within London did conſiſt onely in Oblations, Obventions, and Offerings; but now by the Decree made in the yeere 1535. and confirmed by Act of Parliament made in 37. H. 8. cap. 12. the Parſons in London have 2 s. 9 d. in the pound of rent, in lieu of a tithe. But if a Modus be alleaged to pay 12 d. in every pound of rent for every houſe within ſuch a Pariſh within London, for the tithe of the houſe, this is a good Modus; for it may be that for the Land upon which the houſes have bin built ſuch a Modus of 12 d. time out of minde hath bin paid.

C. 11. part 16 Dr. Grants caſ

By the cuſtome of the Realme, which is

is the Common Law, tithe ſhall be paid for Fiſh taken in the Sea; but the tenth fiſh ſhall not be paid, but ſome ſmall ſum of money in conſideration of a tithe; and ſuch a tithe is a perſonall tithe: but if fiſh be taken in a pond or in a ſeverall Piſcary, and not in the Sea, or any open River, there, the owner ſhall pay tithe therof as a Prediall tithe, which ought to be ſet forth within the Statute of 2.E.6. T.8. Car. in B. R. le Countee de Deſmonds caſe.

To pay a Bucke or Doe, or the ſhoulder of a Deere, when a Deere is killed, may be a good *Modus decimandi* for the tithe of a Parke; and although afterwards the Parke be diſparked, and converted into tillage or hop-grounds, yet the Parſon ſhal not have tithes in kinde but the Modus ſhall remaine. So it is, if all the Parke pale fall downe, which is a diſparking in Law of the Parke, yet the ſame doth not deſtroy the Modus, for the ſame may be a Park againe: but *quere* of this caſe. For the difference hath bin taken where the preſcription runs to ſo many acres of Lands, and where to the Parke by the name of a Parke: for in the firſt Caſe the Modus M. 5. Ia. in Com. B. adjuge acc. M. 11. Iac. in Com. B. Cowper & Andrews caſe, acc P. 19. Iac. in Com. B. Poole & Reynolds caſe.

continueth, but not in the laſt, if it be diſparked.

38. Eliz. in C. B. adjuge. acc. If a Cuſtome be alleaged, that the Parſon ſhall have but the tenth ſheafe of wheat for the tithe of all manner of corne and graine; this is no good Cuſtome. So in the Caſe betwixt *Jacks* and Sir *Charles Chandiſh*, *An.* 11. *Jac. in Com. B.* A cuſtome was alleaged that the owners of ſuch a Farme had uſed time out of minde to take backe thirty ſheafes of their tithe corne, after the ſame was ſet forth, to their owne uſes: And it was adjudged, that it ought to be averred that the Farme was a great Farme, otherwiſe the cuſtome would not be good, for that it tended to the impoveriſhing of the Parſon or Vicar, in the taking away a good part of his profits. But if a man ſowe his Lands with corne, and dye; and afterwards the heire make a compoſition with the Parſon or Vicar to have but the thirteenth ſheafe for his tithe; this is a good compoſition, and ſhall binde the Parſon: and if afterwards the heire endow his Mother of the third part of the Lands, the Mother ſhall take benefit of this

this compoſition, although ſhe come in peramount the ſame.

A Parſon did covenant with A. his Executors and Aſſignees, that for 10.s. paid unto him every yeere by A. his Executors or Aſſignees, that he his Executors and Aſſignees ſhould be quit from paiment of tithe for ſuch Lands, during the life of the Parſon. A. paid the Parſon 10.s. which he accepted of. Afterwards A. made B. enfant his Executor, and dyed, Adminiſtration *durante minori ætate* of the enfant was committed to another, who leaſed out the Lands at will: the Parſon libelled in the Spirituall Court againſt the tenant at will, to have the tithe in kinde of the Lands. And it was adjudged, that he ſhould have a Prohibition, for that the agreement or compoſition did binde the Parſon during his life. And although the Aſſignee could not ſue the Parſon upon the contract, yet he ſhould have a Prohibition to ſtay his ſuit in the Spirituall Court, and put the Parſon to his remedy for the 10.s. upon the contract; for he could not have tithe in kinde, becauſe of the compoſition.

P. 21. Iac. in B. R. Snell & Bennets caſe adjuge.

Every *Modus decimandi* is by preſcription

ſcription, and is intended to have had a lawful cõmencement upon ſome agreement at the firſt made for valuable conſideration with the Parſon or Vicar. And therefore although that tithes in kinde have bin paid for twenty or thirty yeeres, yet the ſame ſhall not deſtroy the Modus: and it is agreed in Doctor and Student, that if it were ordained for Law, that all paying of tithes in kinde ſhould ceaſe; and that every Curate ſhold have aſſigned him ſuch a portion of land, rent, or annuity as ſhould be ſufficient for him; or that every pariſhioner ſhould give a certaine ſum of money for the maintenance of the Curate, that ſuch a Law would be a good Law; and then, if tithes may be ſo changed by a poſitive Law into rent or annuitie, there is no queſtion to be made, but a compoſition made with the Parſon or Vicar to pay a *Modus decimandi*, which hath continued time out of minde; Cuſtome being equivolent unto Law, is good, and ſhall binde the Parſon and his Succeſſours. But a Modus cannot begin at this day, but muſt be by preſcription. But yet at this day a compoſition may be made, which

ſhall

ſhall binde during the life of him that made it, but not his Succeſſors.

The proper Court for the Parſon or Vicar to ſue for his tithes not paid or withholden from him by his pariſhioners, or for the profits of his Church taken from him by another Parſon or Vicar is the Eccleſiaſticall Court by a Libell there preferred againſt them, or by Spoliation. If one Parſon take away the tithes or profits belonging unto the Church of another Parſon, if the tithes or profits doe not amount to a fourth part of the value of the Church, he ſhall have a Spoliation againſt him in the Spirituall Court, although they claime by ſeverall Patrons. And if they claime both by one Patron, there the one ſhall have a Spoliation againſt the other, although the profits doe amount to above a fourth part, as to a third part, or to the moitie of the Church, becauſe the Patronage doth not come in debate: but if the profits doe amount to above a fourth part, and they claime by ſeverall Patrons, there, if one Parſon ſue a Spoliation againſt the other, the party grieved (which is the Patron) ſhall have a *Indicavit*, which is in the nature of a Pro-

38.H.6.20.per Forteſcue.

26.H.8.3.

Prohibition unto the Spirituall Court becauſe the right of the Patronage doth come in debate. But where the right of the tithes onely doth come in debate, and not the Patronage, there the juriſdiction doth belong unto the Spirituall Court: and therefore in 22. E. 4. 24. in an action of Treſpaſſe brought by a Parſon againſt a Vicar for underwoods, and each of them did claime the underwoods as his tithes; there, although their claime was by preſcription (which was triable by the Common Law) yet becauſe the right of the tithes was onely in debate, the Temporall Court was ouſted of the Iuriſdiction.

38. E. 3. Conſ. 1. per Curiam.

22. E. 4. 24. M 29. Eliz. in B. R. adjug. acc 20. H 6. 17. 35. H. 6. 39. ac.

Sprat Subdeacon of Exceter did libell in the Spirituall Court againſt *Nicholſon* Parſon of A. in the Spirituall Court *pro annali pencione de* 30 l. out of his Parſonage: and ſhewed in his Libell, how that *tam per realem compoſitionem, quam per antiquam & laudabilem compoſitionem & conſuetudinem ipſe & predeceſſores ſui habuerunt & habere conſueverunt predictam annualem pencionem* out of the Parſonage of A. And it was adjudged, that although he claimed

M. 10. Iac. in Com. B. Sprat & Nicholſons caſe.

med the ſame penſion by Temporall grounds, *viz.* by preſcription and reall compoſition, yet becauſe the parties were both ſpirituall perſons, he had his election to ſue for the ſame either in the Spirituall Court or in the Temporall Court: and the Statute of 34.H.8.cap. 16. doth licence Spirituall perſons to ſue for penſions in the Spirituall Court; but if a Spirituall perſon that hath ſuch a penſion bring a Writ of anuity for the ſame (as hee may doe if hee will) and count upon the preſcription, he cannot afterwards ſue for this anuity in the Spirituall Court by the name of a Penſion, for hee hath determined his Election; and if he doe, a Prohibition will lye. And ſo it is if a pariſhioner ſhall refuſe for to pay his tithes, or doth not ſet forth his prediall tithes, or ſubſtracteth them after they be ſet forth, the Parſon may libell againſt him in the Spirituall Court if he pleaſe: or elſe at this day by the Statute of 2.E 6.cap.13. the Parſon or other proprietor of the tithes may have their Actions in the Kings temporall Courts, for the not ſetting forth or ſubſtracting of them at their elections; and ſhall recover the treble F.N.B.51.b.

treble value of the tithes, by action of Debt, as it was adjudged by all the Iudges of England againſt the opinion of *Egerton*, late Lord Chancellour of England, 29. *Eliz.* For although the treble value be not given unto the Parſon or other Proprietour of the tithes, by any expreſſe words in the Statute, yet for as much as hee is the party grieved, and hath the right of the tithes in him, the treble value is given unto him: for whenſoever a Statute giveth a forfeiture or penalty againſt any who wrongfully diſpoſſeſſeth another of his right or intereſt; in that caſe, hee that hath the wrong ſhall have the forfeiture or penalty, and ſhall have his action at the Common Law for the ſame, or elſe he may ſue in the Eccleſiaſticall Court for the ſame cauſe: but if the Parſon or other Proprietour of the tithes will ſue in the Eccleſiaſticall Court for the ſubſtraction of the tithes, hee ſhall recover there but the double value of the ſame; and therefore the caſe was H. 11. *Iac. in Com. B.* that a Parſon did libell in the Spirituall Court for ſubſtraction of tithes: and the Defendant in the Common Plees ſuggeſted

H. 11. Iac. in Com. B. Baldwine & Girris caſe.

to

to be diſcharged by priviledg within the Stat. of 31 H.8.& had a Prohib.therupon: and iſſue being joyned in the Court of Common Plees upon the priviledge, the Plaintiffe in the Prohibition was Nonſuit; whereupon a Conſultation was awarded, and ſentence afterwards was given for the Parſon in the Spirituall Court, that hee ſhould recover the ſingle value, and ſet the ſame certaine, *Et ulterius quod recuperet duplicem valorem*, and ſet the ſame alſo certain: and after this ſentence a Prohibition was awarded, becauſe they exceeded the value which was to be recovered in their Court; and it was adjudged, that although the ſentence was not, that he ſhould recover the treble value, yet becauſe the ſentence did mount to ſo much being layed together, a ſpeciall Prohibition ſetting forth all the matter at large was awarded. And a Parſon ſhall have his action upon the Statute of 2.E.6. for the treble value, or may ſue for the double value in the Eccleſiaſticall Court at his election, although he be not Parſon at the time of the action brought; for if a Pariſhioner doth not ſet forth his tithes, or ſubſtracteth them

them after they are ſet forth; and afterwards the Parſon be deprived for ſymony or other crime, and ſo declared by a ſentence given there againſt him; yet may ſuch a Parſon after deprivation ſue in the Spirituall Court for the ſubſtraction of the tithes before he was deprived, and a Prohibition will not lye; for ſo was it adjudged H. 13. *Iacob.* in *Coles* caſe of Grayes Inne.

And thus much briefly of Tithes, the profits of the Church or Parſonage belonging unto the Incumbent: let us now come to ſpeake ſomewhat of Churches Collegiall and Parochiall, preſentative and donative; and how, where, and by whom an union may be made of two Churches or Chappels into one; and of the Appropriation of them and Advowſons.

CHAP.

CHAP. XXVI.

Of Churches Cathedrall, Collegiall and Parochiall, preſentative and donative: Of viſitation of them: Of proxies incident to viſitation; and of the union of Churches, and the Appropriation of them, and Advowſons.

ALL Churches are Cathedrall, Collegiall or Parochiall; a Cathedrall Church is the See or Church of the Biſhop, whereof he is the Incumbent. Of every Cathedrall Church there is a Deane and Chapter, which are Prebends or Canons, who are of counſell with the Biſhop: but they have and hold their poſſeſſions ſevered and divided from the poſſeſſions of the Biſhop. The viſitation of Cathedrall Churches doth belong unto the Metropolitan of the Province, or elſe unto the King by Commiſſioners appointed by him, when the Temporalties of the Archbiſhop of the Province *ſede vacante* are in the Kings hands. Collegiall Churches are ſuch as in times paſt were

C. 1 1. part. 75. 17. Aſſ. 29. 40. E 3. 28.

in

in Abbies, Priories, and the like, and ſuch as are at this day in Colledges. A Parochiall Church is that *ad quam Eccleſiam plebs convenit ad percipienda Sacramentum Baptiſmatis & corporis & ſanguinis Chriſti unde pabulum ad animas ſuſtentendas, ſuſcipiunt.* Of which the Parſon of whom wee have before ſpoken at large, is the incumbent, who hath cure of all ſoules within the Pariſh.

Iohannes Bellonias de Etimologis.

In a Church Parochiall there are other Officers, beſides the Parſon or Vicar, *viz.* the Churchwardens and the Pariſh Clarke. The Churchwardens are a corporation who have a capacity to take goods to the uſe of the Church; and the government of the Church goods doth appertaine unto them. They ſhall have an action of Treſpaſſe for taking away the goods or the ornaments of the Church in their owne names. And alſo ſhall have an appeale of robbery for the goods of the Church ſtolne out of the Church. And if they recover damages in any Action brought by them as Churchwardens, the damages ſhall goe to the uſe of the Church, and they ſhall not have them to their owne

C.Litt.3.a.

13.H.7.10,a.

37.H.6.30.

2.E.2.Itin. Kanc.abridg. Aſſi.76.

8.E.4.6.a. 13.H.7.10.

owne uſes. But the Churchwardens have not a capacity to purchaſe lands to the uſe of the Church, nor is any leaſe made by them of the Church lands good in Law. C. Litt. 3. a.

The diſpoſing and placing of the Pariſhioners in ſeats in the body of the Church, doth appertaine unto the Ordinary *de communi jure*, and by appointment from and under the Ordinary to the Churchwardens. And for a ſeat in the Church, the ſuit doth properly belong unto the Spirituall Court. But if a cuſtome be alledged, that the Churchwardens themſelves in their own rights time out of minde, without the power of the Ordinary, have uſed to have the placing of the pariſhioners in ſeats in *Navi Eccleſia*; this is a good cuſtome. And if the Churchwardens doe accordingly place a pariſhioner in ſuch a ſeat, and ſuit be brought againſt the party for his ſitting there by their appointment; ſuch ſuit ought to be at the Common Law, and not in the Eccleſiaſticall Court, becauſe the Eccleſiaſticall Court cannot try the cuſtome there. 9. Car. in B. R. Tompſons caſe adjudg.

If a Gentleman, with the conſent of

M. 10. Jac. in Com. B. Tym & Gawens caſe adjug.

the Ordinary, hath built an Ile to the Church, and ſet convenient ſeats there for him and his family, and hath alwaies repaired the ſame at his owne coſts and charges: if the Ordinary place another man there in the ſeat with him without his conſent, hee may have his Action upon the Caſe againſt the Ordinary; but if with the conſent of the Ordinary a man ſet a ſeat in *navi Eccleſiæ*, and another man pull downe the ſame or deface it, an Action of Treſpaſſe *vi & armis* will not lye againſt him by the party, becauſe the Freehold is in the Parſon, but in ſuch Caſe hee may ſue the party in the Eccleſiaſticall Court for the wrong done unto him.

The Churchwardens are at every Viſitation of the Biſhop of the Dioceſſe to make preſentment of all miſdemeanours and offences in the Parſon, Vicar, or pariſhioners, either concerning Religion or the breach of the orders of the Church; and for to preſent the defaults of all that repaire not unto the Church for to heare divine Service there, or obſerve not the rites and ceremonies of the Church, accor-

according to the Lawes and Canons of the Church. And although they have ſo large authority in the pariſh and Church under the Ordinary, yet are they not eſteemed Eccleſiaſticall perſons, but are for the moſt part laymen, and may be removed from their offices or places by the Ordinary upon juſt cauſe of complaint made unto him, or elſe by the Pariſhioners themſelves. And therefore if a pariſh doe preſcribe to have the election of their Churchwardens, and that he Churchwardens elected by them have uſed time out of minde to continue Churchwardens for two yeeres together, with the aſſent of the pariſhioners, yet may the pariſhioners themſelves within the two yeeres remove ſuch Churchwardens, and appoint others in their places; otherwiſe they might within the two yeeres waſte all the Church goods, for which the pariſhioners could have no remedy againſt them. 2 H.8.5.b.

The pariſh Clarke is an officer in the Church too, but he is moſt commonly a lay man, and no Eccleſiaſticall perſon; and his office is a lay

18.E.3.27.pl. 24. acc. office, and therefore hee is to be choſen by the pariſhioners, and not by the Parſon or Vicar alone, and he is removeable upon cauſe from his office at their wils and pleaſures. This appeareth by the booke of 3.E.3. *Annuitie* 40. where an annuity was granted unto a man, untill hee was promoted unto a Benefice; and in a writ of Annuitie brought by the grantee, the Defendant did alledg, that the Plainriffe was made by him the Clarke of ſuch a pariſh Church; and it was ruled to be no good plea in barre to bar him of his annuity, for that the Clarke of a pariſh was but a lay officer, and hee was removeable at the pleaſures of the pariſhioners: and the Clarkeſhip was no Benefice within the intent of the grant. So likewiſe was it adjudged in caſe of a Prohibition in the Common Plees, P. 8. *Jac.* betwixt *Cundit* and *Plomer*, where the caſe was that the pariſhioners of the pariſh of Saint *Alphage* in Canterbury did preſcribe that time whereof the memory of man was not to the contrary, they had uſed for to chooſe their pariſh Clarke; and the ancient Clarke being dead, they did

3.E.3 Annuity 40.

P.8.Iac. Com. B. Cundit & Plomers caſe.

did chooſe the plaintiffe *Cundit* Clark; and that thereupon the Vicar by force of the new Canon made 1. *Jacobi*, did chooſe another Clarke, and thereupon *Cundit* had a Prohibition in the Cõmon Plees, upon a ſuit brought by the other Clarke in the ſpirituall Court: after which Prohibition awarded, *Cundit* was ſued againe in the ſpirituall Court, for cutting the bread and ſetting the ſame vpon the Communion Table, and for ſinging in another tune then the pariſhioners and the other Clarke did: and was therefore deprived by a ſentence given in the Spirituall Court: and *Haughton* Serjant of counſell, with *Cundit*, moved for another Prohibition, and ſaid, that although this laſt ſuit in the Spirituall Court was not directly for the uſing and exerciſing the Office of Clarke, yet by the matters contained in the Libell, it was drawne into queſtion, whether hee were lawfully Clarke there or not. And by *Cooke* chiefe Iuſtice, and the whole Court, it was adjudged that a Prohibition ſhould be awarded in that caſe: for the Canon was againſt the Common Law,

and particular customes are part of the Common Law; and by the suit in the Spirituall Court they would examine whether hee were lawfull Clarke or not; for if he were lawfull Clarke, then was it lawfull for him to cut the bread for the Communion, and to set the same upon the Communion Table; but then it was moved by *Haughton* that *Cundit* the Plaintiffe was deprived by sentence. But it was resolved by the whole Court, that notwithstanding the deprivation by sentence, yet after the sentence a Prohibition should be awarded, for that the Deprivation was meerly void; For the Clarkeship of a parish was but a lay-office, and might be executed by a lay man; and therefore the Ordinary had not power to deprive him for the executing his said office; and the party notwithstanding the deprivation might maintaine an action as Clarke; for so is the booke 8. Assi. 29. and *Cooke* advised an Information to be drawne against those in the Spirituall Court for holding plea of a thing which was meerely lay; as the like was in *Temps H.8. quod vide* in *Brookes* Case.

Case. And the booke of 3. E. 3. Annuit. 40. before mentioned, and 18. E. 3. 27. pl. 24. was vouched in this case, where a Formedon was brought of the office of Serjancy of the Church of L. and it was further adjudged in this case that the prescription should be preferred before the said new Canon, because by the prescription no more was claimed then by the Law of the Realme was due and usuall, and a Prohibition was awarded accordingly.

Churches Collegiall or Parochiall presentative were alwayes visitable by the Bishop of the Diocese, if no speciall exemption were made by the Founder of the Ordinaries Iurisdiction in the visitation thereof. And so were all Abbies, Priories and other religious houses; and the Bishops and other visitors had anciently Proxies allowed them for their visitations, which was a certaine Exhibition in *Esculentis & poculentis* in the time of their visitations.

A Proxie by the Canonists is called *Procuratio*, and ought to be *suum qualitatem personæ visitantis, & substantiam*

viſitatorum. But when the pompe of the Viſitors did require ſuch proviſions as were intollerable both to Incumbents of Churches, and to Religious houſes, whereof they were the viſitors; every Church and religious houſe was reaſonably taxed, and the Proxies of Proviſions were reduced to certaine ſummes of money (called at this day Procuration money) which were paid yeerely in the nature of penſions to the Ordinaries, who had the power for to viſit them.

Vpon the diſſolution of Abbies and Monaſteries, Proxies were not extinguiſhed, although the viſitation did ceaſe. Neither were they extinguiſhed by unity of poſſeſſion in the hands of the King, but ſuſpended onely. And when the Abbies and Priories and the Lands out of which the Proxies were paid by graunts from the King came to lay men, then were theſe Proxies revived; and at this day they are due and payable out of all Impropriations unto the Ordinaries, although the viſitation doth ceaſe. And all other Churches preſentative doe at this day pay a certaine

ſum

ſum of money to the Ordinarie for a Proxie for his viſitation.

Proxies doe agree with tithes in ſome reſpects: For as the Inſtruction of the people in the ſervice of God was the firſt cauſe of paiment of tithes, ſo viſitation (which as *Littleton* ſaith, doth alwayes accompany Inſtruction) was the firſt cauſe of Proxies. And as no lay man can preſcribe in *non Decimando*, as before is ſaid; ſo according to the rule of the Canon Law, *Nullus eſt adverſus Procurationem preſcriptio.*

But if a Parochiall Church be Donative (as the ſame may be) and exempt from all Ordinaries Iuriſdiction, there the Ordinary ſhall not viſit the Church, but the Patron by Commiſſioners appointed by him. And there it ſeemeth Proxies ſhall not be paid, for that Proxies are ſpirituall duties, which had their originall by the Canon Law, and were due onely to Ordinaries and Eccleſiaſticall viſitours, and were recoverable onely in the Eccleſiaſticall Court, and were not due or payable unto lay Patrons. If the King doe found a Church or Chappell hee may exempt

the

20.E.3. excom. 9. 21.E.3.60. the ſame from the Ordinaries juriſdiction; and then the Lord Chancellour of England, or Lord Keeper of the great Seale for the time being, ſhall viſit the ſame; and if the King by his Letters Patents doe licence a common perſon to found a Church or Chappell Donative, exempt from the Ordinaries juriſdiction, the ſame ſhall be viſited by the Founder, and not by the Ordinary. And if ſuch a Clarke donative be diſturbed, the Patron or Founder ſhall have a *Quare Impedit preſentare ad Eccleſiam*, and declare upon the ſpeciall matter. But if the Patron of a Church donative doe once preſent unto the Ordinary, and his Clarke be admitted and inſtituted, it is now become preſentable and ſhall never be donative after; and then the Ordinary ſhall viſit the ſame, and a Proxie ſhall be paid, and lapſe ſhall incur to the Ordinary, as it ſhall doe in other Benefices preſentable.

6.H.7.4. per Keble. 8. Aſſi.29. F.N.B. 42.

C.Litt.344. 22.H.6.26.

By the Common Law, if two Churches be ſo poore and have ſo ſmall revenues that the Incumbents thereof cannot live and maintaine their charge

50.E.3.27. 40.E.3.28.2.

out

out of the profits of them, the Ordinaries, Patrons and Incumbents may make a consolidation or union of the two Churches into one; and then upon the union it must be appointed who shall present next after the union, one of them or both, or joyntly or severally by turnes; and upon such union and agreement made by instruments under the hands and seales of the Patrons, Ordinaries and Incumbents, each of the Patrons, if he be disturbed in his turne may have a *Quare Impedit presentare ad Ecclesiam*; for although by the union the incumbency of one Church be lost and extinguished, yet the Patronage doth remaine in being. And therefore if an Annuitie be granted unto the Church of D. and afterwards D. is united to S. if the grantee after the union release to the Patron of the Church of Sale, it doth not extinguish the Annuitie, but a release to the right Patron, although in time of vacation had extinguished the same. Doct. & Stud. 116.

Every union at the Common Law must be made by the Ordinary with the consent of the Patrons by special words

of

of *unire, annectere, consolidare*, or the like, and must be perpetuall; for an union made of two Churches for life or yeeres is not good by the Common Law.

34.E.3. Q.I. 197. • It hath bin some question, whether at the Common Law an union may be made of one Church or Chappell unto another without the Kings licence or consent, and I conceive that it may; for the union is the act of the Ordinary, *Vnio est actus spiritualis*: and as one saith, *Munus Episcopale est unire, quia tota Diœcesis est cura Episcopi.* And the Licence of the King is not so necessary in the case of union of one Church unto another, as the same is in the Appropriations of Churches or Advowsons. And I finde in our bookes, that in cases of union, the Licence of the King is not pleaded, but it is onely said, that the union was made by the Patrons and Ordinary; or *Concurrentibus his qui in lege requiruntur.* In 11.H.7.9. The Chappell of *Wanborow* was united unto *Magdalene* Colledge in Oxford, and it was pleaded that the union was by the Patrons and Ordina-

11.H.7.9.

ry,

ry, but it is not pleaded to be with the Licence of the King. And ſo in 9. *Eliz. Dyer* 259. the pariſh Churches of *Hlesfeild* and Saint *Martins* in the County of Southampton were united by the Ordinary with the conſent of the Patrons, but it doth not appeare that there was any Licence of the King.

It is certaine, that no perſon can found any Church, Chappell or Colledge without the Kings Licence, as appeareth by the caſe of 7. E. 6. *Dyer* 81. where Pope *Vrban* at the requeſt of the Baron of Greyſtocke founded a Colledge of a Maſter and ſix Prieſts, which was certified into the booke of firſt Fruits by the name of *Rectoriam & Collegium de Greyſtocke*: yet becauſe it was there agreed, that the Pope could not found or incorporate a Colledge within this Realme, nor aſſigne nor licence any other to aſſigne any Lands to the ſame, but the ſame muſt be done by the King himſelfe; it was adjudged, that the Foundation was void; and although that the Colledge had the countenance of a lawfull Foundation, yet was no Colledge

ledge within the Statute of 1. E. 6. of Chauntries.

But if one Church or Chappell be united unto another, without the Kings licence, yet the union thereof is not void, for these causes: First, the Parson, Patron and Ordinary at the Common Law might have alienned the possessions of the Church, or have charged the same without the Kings Licence, *à fortiori* they might unite two Churches into one, for that the King lost nothing thereby. Secondly, if an Advowson holden of a Common person be appropriated without the Kings licence, this is no forfeiture of the Advowson, but the King shall present upon the avoydance, *nomine districtionis tantum*, untill a fine be paid unto the King for the alienation without Licence, but it doth not make void the Appropriation. If then the Appropriation in that case be not avoided, *à fortiori* an union shall not be avoyded, which is lesse then an Appropriation, although it be without the Kings Licence. Thirdly, the right of the King to the Church is onely to present for

21. E. 3. 5. per Shard.
38. Ass. 22. gr. 1. sec.

Lapse,

Lapſe, which is but a caſuall and collaterall right, and therefore an union made without the King of two Churches into one by the Common Law may be good, and ſtand good in Law.

By the Statute of 37. H.8. cap. 21. it is enacted, that whereas there be many poore pariſhes within one mile of another, the tithes and revenewes whereof be not ſufficient to maintaine the Curates and for the maintenance of the reparations, ornaments and duties belonging to the Church, that an union or conſolidation of two ſuch Churches may be into one with the conſent of the Ordinaries, lawfull Patrons and Incumbents by writings under their hands and ſeales. In that Statute there is no mention made of the Licence of the King to be had, or that the union muſt be with his conſent, which if the conſent of the King had bin neceſſary, I conceive the makers of the Law would not have omitted. And the King doth not loſe any thing by ſuch union; for that all tenths and firſt Fruits of Churches or Chappels annited

ted according to that Statute are thereby saved and referred to the Crowne.

T. 9. Car. in Com. B. Doct. Rawlyns & Sir Henry Yarleys case.

It was lately depending a question in the Common Plees, whether the said Statute of 37. H. 8. did extend to a Church Parochiall onely, or unto the other Churches; and whether by that Statute a parochiall Church might be united unto a Church Collegiall; and whether the same might be without the Kings license or consent, which I will not take upon me for to determine; but in all unions made of Churches, I conceive it to be the safest and surest course to have and obtaine the Kings license, or his consent, although it be subsequent to the union made, for that perhaps will be sufficient: for so was it holden to be in the case of 11. H. 7. for there after the union made, the King granted his pardon, which was holden a subsequent assent and sufficient to make the union good: and so was it adjudged *Trin. 37. Eliz. in Com. B.* in *Austin* and *Twynes* case, that the confirmation by the Kings Letters Patents of an union made of the parish

Church

Church of Aſhe unto the Deanery of of N. after the union made was ſufficient.

Now although it be granted, that one Church or Chappell may be united unto another Church or Chappell both by the Common Law, and by the Statute of 37.H.8. by the Patrons, Ordinaries and Incumbents, without the Licence precedent of the King or his ſubſequent aſſent, yet cannot there be any Appropriation made of any Church or Advowſon without the Kings ſpeciall licence firſt obtained; for that every Appropriation is Mortmayne, and the Patronage of the Advowſon is thereby loſt and extinguiſhed, and the corporation or perſon to whom the Appropriation is, is become perſon imperſonee. 17.E.3.51. 25.H.6.br.97. 8.H.4.15. 11.H.7.2.

Concerning Appropriations of Advowſons or Churches, obſerve briefely theſe rules. Firſt, no man can make any Appropriation of any Church, having cure of ſoules, the ſame being a thing meere Eccleſiaſticall, and to be made to ſome Eccleſiaſticall perſon or body corporate, but hee onely who

hath Eccleſiaſticall juriſdiction: and therefore in all Appropriations that inſtrument of Appropriation is by the Biſhop or Ordinary, and runs in this or the like forme, *viz. Autheritate noſtra Ordinaria Eccleſiam parochialem de B. &c. Priori & Conventui, &c. anneximus appropriamus & unimus per preſentes.* But yet the King is ſuch a ſpirituall perſon, that hee of himſelfe may appropriate any Church or Advowſon, becauſe he hath the Eccleſiaſticall juriſdiction and power in him; but no other perſon within the Realme or without, but the King or the Ordinary by authority derived from the King can make any Appropriation. And therefore Appropriations made by the Pope or by licence from and under the Pope were never allowed of by our Law. Secondly, every Appropriation muſt be with the licence of the King, otherwiſe it is not good. And the licence muſt be to the ſpirituall body or perſon to whom the Appropriation is to be made to take the ſame, and not to the Biſhop to make the ſame. An Advowſon of a Prebend holden of the King

C.5.part.10 in Caudries caſe.

11.H.4.88. M.22.E.3.13. acc.

was

was aliened to an Abbot and his succeſſours; and afterwards the King granted unto the Abbot and his ſucceſſours, that the Abbot and his ſucceſſours ſhould hold the Prebend in their owne hands; yet becauſe the firſt alienation was without licence, the King did ſeize the Prebend, notwithſtanding his ſubſequent grant. And that the ſame muſt be to the ſpirituall body or perſon appeareth by *Pridle* and *Nappers* caſe, C. 11. part 9. where upon the ſpeciall verdit it was found, that the King by his Letters Patents *Licentiam dedit Priori & Conventui &c. quod ipſi Eccleſiam parochialem de B. appropriare conſolidare incorporare &c. Et eam ſic appropriatam conſolidatam & incorporatam in proprios manus & uſus retinere poſſint.* Thirdly, the Licence to appropriate is alwayes generall, *Quod cedente vel decedente Rectore, &c.* And therefore an Appropriation may be either when the Church is full of an Incumbent, as to ſay (that the Parſon to whom the Appropriation is to be, after the Church ſhall become void ſhall be Parſon, and ſhall retaine the. 17. E. 3. 59. C. 5. part. 56. in Knights caſe

Glebe and fruits thereof to his owne
11.H.4.13. use;) or else when the Church is void of an Incumbent. In 8. *Eliz. Dyer* 244. an Appropriation was made by the King of a Parsonage unto the Bishop of Coventrey and Lichfeild, when the Church was full of an Incumbent, and adjudged the Appropriation good, and that the Bishop had nothing in the Parsonage during the life of the Incumbent; and therefore a Lease made thereof by him to begin after such time that the Parsonage should come to him or his successours, was adjudged void. Fourthly, upon
2.H.4.9. the Appropriation of every Church,
C.12. part.10. there must be a Vicar endowed, and a competent sum of money be appointed to be yeerely distributed to the poore. And lastly, all Appropriati-
C.5.part.10. ons have bin usually to Corporations
C.12. part.12. or persons spirituall, and not to bo-
Com.500. dies politique, consisting of meere lay Men. But whether the same may be at this day to lay-men, or lay Corporations, I will not resolve; for it was late a question depending in the Kings Bench, and I take it not yet resolved,

ved, Whether the King since the Statute of 25. H. 8. may not by his Letters Patents Appropriate a Church parochiall, which was before presentative unto a lay Corporation, all the members of the Corporation being meere lay-men. Trin. 9. Car. in B. R. Alden & Tothils case

And thus much also briefly concerning Churches Parochiall and Collegiall, Presentative and Donative; and of the union, Consolidation and Appropriation of them, and Advowsons.

CHAP. XXVII.

Of the power of the Ordinary, and of his Certificate of loyaltie of Matrimony; Bastardy, Profession, and Excomengement.

AS I began this Discourse with the creation and investure of Bishops, so I have thought fit for to conclude it with the power of the Bishop and Ordinary,

dinary, and to shew in what cases he must certifie into the Kings temporall Court, the proceedings determined and tried by him in the Ecclesiasticall Court. You must therefore know, that of those things or causes which are meere Ecclesiasticall, the jurisdiction belongeth unto him, and he is the Iudge thereof; and his Certificate shall binde the parties in the Kings temporall Courts. If therefore the writs of Dower, or other writs brought in the Kings temporall Courts, issue be joyned upon *Ne unque accouple in loyal Matrimony*, this being a cause which is meerly Ecclesiasticall, the triall thereof must be by the Bishop, upon Inquisition taken before him as Iudge; which is after this manner, The King first sends his writ to the Bishop to make the enquirie; for the Ecclesiasticall Iudge before he hath received the Kings writ, may not of himselfe enquire of the loyalty of the Matrimony: but after such time as hee hath received the writ to make the enquire, he must not surcease for any Appeale or Inhibition, but must proceed until hee hath certified the Kings

22. E. 4. Consultation. 6.

Kings Court thereof. And then when the Bishop hath received the Kings writ, he doth give notice thereof unto the party who tooke exception to the Matrimony, at his dwelling house, if he have any within the Diocesse, to speake at a day prefixed by him against the loyalty of the Matrimony, if hee will: and after such notice given, whether the party come or not, the witnesses of the demandant to prove the loyalty of the Matrimony are taken, and admitted by the Bishop, if no sufficient exception be taken to the witnesses. After the Depositions taken, they are published and certified into the Kings Court, where the issue was joyned by letters under the seale of the Bishop; the forme of which Certificate you shall finde to be after this manner, *viz. Breve Domini Regis presentibus annexum omni qua decuit reverentia accepimus virtute cujus Brevis vobis certificamus. Quod omnibus & singulis in Brevi illo specificat ritè & debitè juxta juris Ecclesiastici exigentiam observat. et vocat. in ea parte vocandum diligentem & celerem fieri fecimus Inquisitionem de ri*

veritate de & ſuper materiis in Brevi illo content, per quam luculenter & evidenter comperuimus & inveniemus per legitimas Probationes, & alia in hac parte Canonice requiſit. Quod A. in brevi predict nominata apud B. in Com. N. in Diocæſi N. D. in predict. Brevi ſimilter Nominato legitimo Matrimonio copulata fuit. In cujus &c.

By this Certificate it appeareth, that the Ordinary muſt certifie the point in iſſue generally, *viz. Quod copulata vel non copulata fuit in legitimo matrimonio,* and muſt not make a ſpeciall verdict of it, or expreſſe the manner of the mariage at large. And after ſuch Certificate made, there ſhall be no appeale, but the ſame ſhall bar and conclude all parties for ever. And after ſuch Certificate and reſomons of the tenant in the Kings temporal Court, judgement ſhall be given for the Plaintiffe.

14.Eliz.Dyer 303.313.acc.

T.15.H.7.Rot 303. 11.H.4.84.

If a writ of Dower be brought againſt the Biſhop of N. and others by ſeverall Precipes, and they plead, that the demandant, *Ne unque fuit accouple en loyall Matrimony*, yet ſhall the writ goe to the ſame Biſhop to certifie the loyal-

10.R.2. triall 100.

loyalty of the Matrimony, and not unto the Metropolitan; for although the Biſhop be a party to the writ and a Defendant in the cauſe, yet becauſe there are other parties Defendants beſides himſelfe, who ſhall be bound by his Certificate, it ſhall be preſumed, that the Biſhop will doe right, and therefore he himſelfe ſhall be Iudge of the loyalty of the Matrimony. But if the Biſhop onely be Defendant and plead ſo in diſability to iſſue, he ſhall not try the Matrimony, for then hee ſhould be Iudge in his owne cauſe, which the Law will not ſuffer; and therefore the Certificate ſhall be by the Metropolitan. But if in a writ of Dower or other writ, the iſſue to be tried be, Whether *Alice* the demandant were the wife of I.S. or not: the ſame ſhal not be tried by Certificate of the Biſhop, but by Iury at the Common Law. 29.E.3.15.

Baſtardy is an Eccleſiaſticall cauſe; and if generall baſtardy be alleaged in diſability of the Plaintiffe, the ſame ſhall be tried by the Certificate of the Biſhop, whether it be in a reall or perſonall action. But if it be pleaded, that the C.8.part. le Abbot de Strat. Mercellus caſe. 4.E.4.35.

plain-

38. Assi. 24. 7. E. 6. Dyer 89 41. E. 3. 11. 1 H. 6. 3.

Plaintiffe was borne at such a place before the marriage solemnized, *Et issint Bastard*; this is a speciall Bastardy, and the same shall be tried by a Iury at the Common Law, where the birth is alleaged.

40. E. 3. 27. per Belk. 31. E. 3. tryall 89. 2. R. 3. 4. cont.

Profession is another spirituall thing, and triable by the Certificate of the Bishop; for so was Profession alleaged in a Knight of the Order of Saint *Iohn* of Ierusalem, tried by the Certificate of the Bishop, where the Profession was aleaged, In 9. H. 7. 2. *per Hussey*. If a man plead Profession in another man which is traversed, it shall be tried by the Certificate of the Ordinary: but if it be pleaded, that at the time of the making of such a Deed, or doing of such a thing that the party was professed in Religion, the same shall be tried by Iury, because the Profession refers to a certaine time. But if Profession or Bastardy be alledged in a stranger, who is a stranger to the first writ, the Profession or Bastardy shall be tried by Iury at Law; for that if the triall should be by the Ordinary, and he make his Certificate of the same, the same remaines a Record

43. E. 3. 37. b. 33. E. 3. triall 90.

cord for ever, and should conclude and binde the party for ever, for hee can make no averment against such a Certificate, which would be both dangerous and prejudiciall unto him who is a stranger to the writ.

Admission and Institution are spirituall things, and shall be tried by the Certificate of the Bishop: for Institution is but the letter of the Bishop, of which a Iury cannot take notice: but Induction is a temporall thing, and shall be tried by Iury at the Common Law. 22.H.6.27.a. 8.H.5.9.b. 22.H.6.28. 2.H.4.17.

Excommunication is another spirituall thing; and if it be pleaded in disability of the party in the temporall Court, the same must be certified thither by the Bishop himselfe; for no man can certifie an Excomengement but onely the Bishop, who is immediate Officer to the Kings Court to this purpose. But if the Bishop be *in remotis*, or *sede vacante* an Excomengement certified by the Guardian of the spiritualties is sufficient. *Quere*, whether Letters of Excomengement may be speciall in the Chancery, or whether C.Litt. 134.a.

th y

they ought to be in that Court where the plea is depending, 20.H.6.25. for it seemeth by the Booke of 2.E.4 4. that letters of Excomengement certified in Chancery were sent into the Kings Bench, and were not allowed there, because the Certificate was to the Chauncery onely; for which he partly obtained new letters of Excommunication; *Omnibus Christiani fidelibus, &c.* An Excomengement certified by the Comissary or Officiall of the Bishop is not good at this day, although in ancient times it hath bin allowed. If the Pope or any other, having foraine authority, doe excommunicate any Subject of this Realme, this is no disability of his person; for the Common Laws disallow of all Acts done by foraine power in disability of any subject within this Realme.

11.H.4. 64. in Delt.

7.E.4.14.

16.E.3.excomeng.4.

If a Bishop certifie the Kings Courts that another Bishop did certifie him that the party is Excomenge in his Diocesse, this Certificate, upon the Certificate or report of another is not good, nor allowed of in our Law; for the Bishop must certifie the party to be excomenge

33.E.3.excomeng.29.

comenge upon his owne knowledge. 9.H
But if a man be Excomenge by the 7.E
Commissary or Officiall of the Bishop, the same being done in the Bishops right, and in his Court, is sufficient, although the same must be certified into the Kings Courts under the seale of the Bishop onely.

If a Bishop be Defendant in an Action brought against him, an Excomengment of the Plaintiffe, certified by him in his owne Court is not allowed to be in disability of the Plaintiffe; for that the Bishop shall not be Iudge in his owne cause: and the temporall Court shall intend the same to be in the same cause. 5.E.3.8. 16.E.3.excomeng 5. 9.H.7.21. 10.H.7.9.2.

FINIS.

ERRATA.

1. *Part.*

PAg.3.Line 17.read *anuli*.p.3.l.ult. *quod*. 5. 22. See. 31.4.recited. 4. 26. accordant. 42. ult. *fundi*. 43.20. *levy ſine*. 44.11. had there. 49.19. *deſtre*. ibid *deins*. 62.4.refuſe. ibid.l.5.*luy eſtre*.90. 12.defect. 91.3.In.

2. *Part.*

Page 46.line 12.r. title. 73.22. *Juris eſt*. 74. 4. controverted. 75.7. *Sempringham*. 80.13. pernency. ibid.lin. ibid. ſue. ibid.23.*Chock*. 81.10.Prior Parſon imperſonee. ibid.17. Confreres. 85. 17. this. 92.2.baylee. 96.7.*ſuapte natura*. 97.9.*perſolvuntur*. ibid.10 *imponitur*. ibid.12. *Cestuni*.121. 12. *Nulla*.